85-952

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GRASON ELECTRIC COMPANY, et al.,
Petitioners,

vs.

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the anticompetitive activities of a municipal electric utility in the electrical contracting business, a business in which it is engaged as a purely proprietary business enterprise, are exempt from the antitrust laws under the state action doctrine where the state has neither a policy nor an interest in displacing competition in that business.

PARTIES TO THE PROCEEDING *

Petitioners are:

Grason Electric Company, a California Corporation;
Luppen and Hawley, Inc., a California Corporation;
May-Han Electric, Inc., a California Corporation d/b/a M and M Electric Company;
Myers Electric, Inc., a California Corporation;
Rex Moore Electrical Company, a California Corporation;
S. J. Pettinato, Incorporated, a California Corporation;
Amos J. Walker, Inc., a California Corporation;
Welco Electric, Inc., a California Corporation;
Jack J. Teapolt d/b/a Action Electric Company;
Diede's Plumbing & Electric, Inc., a California Corporation;
Geo. C. Foss Co., a California Corporation;
H & D Electric, Inc., a California Corporation; and,
Perri Electric, Inc., a California Corporation.

Respondent is:

Sacramento Municipal Utility District, a California Municipal Utility District.

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*Grason Electric Company; Luppen and Hawley, Inc.; Myers Electric, Inc.; Geo. C. Foss Co.; and, Perri Electric, Inc. have no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

May-Han Electric, Inc. does business as M and M Electric Company; Rex Moore Electrical Company has changed its name to Rex Moore Electrical Contractors & Engineers; S. J. Pettinato, Incorporated does business as Delta Electric Company and is affiliated by partial common ownership with Delta Commercial Services, Inc., doing business as Delta Lighting and Sign Co.; Amos J. Walker, Inc. does business as Walker Properties; Welco Electric, Inc. is a subsidiary of Welco Properties, Inc., a California Corporation; Jack J. Teapolt, an individual, does business as Action Electric Company; Diede's Plumbing and Electric, Inc. has changed its name to Diede, Inc. and then to The Diede Corporation and is doing business as Dial One Diede Appliance Service; H & D Electric Inc. is affiliated by partial common ownership with Howard D. Day, Inc., Colonial Title Guaranty Company, and Colusa Land Title Company; and, other than that these petitioners have no parent companies, no subsidiaries (other than wholly owned subsidiaries) and no affiliates.

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SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Grason Electric Company, et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered September 4, 1985.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals is officially reported at 770 F.2d 833 (9th Cir. 1985), and appears in Appendix A to this Petition. A-1-9.[1] The oral decision and order rendered by the United States District Court for the Eastern District of California on the parties' cross-motions for summary judgment appear in Appendix B at A-10 and Appendix C at A-13-25, respectively. The Judgment of the Ninth Circuit appears in Appendix F at A-73. The Judgment of the District Court appears in Appendix G at A-74.

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[1] References to the Appendix are given in the following form: Page 1 of the Appendix is referred to as "A-1", etc.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Ninth Circuit was entered on September 4, 1985. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the applicability of the Sherman Act, specifically 15 U.S.C. Sections 1 and 2, to the proprietary business activity of a municipality created under state law. The provisions of state law involved are California Public Utilities Code Sections 12703, 12721, 12801, 12892, 13091, 12809, 12819 and 13651.

The pertinent provisions of the Sherman Act are set forth in Appendix H. A-75. The pertinent State Statutes are set forth in Appendix H. A-75.

STATEMENT OF THE CASE

The respondent is a municipal electric utility engaged in the sale of electric energy and also engaged in the electrical contracting business in direct competition with petitioners. Respondent is engaged in the electrical contracting business as a *purely proprietary business enterprise.* Petitioners and other firms that are engaged in the unregulated electrical contracting business have been foreclosed from free and open competition by the monopolistic and anticompetitive practices of Respondent in the electrical contracting business. The State of California has neither a policy nor an interest in artificially affecting competition in the electrical contracting business. There is no state supervision of Respondent's anticompetitive practices.

Relying upon broad enabling statutes and, indeed, the very statutes which were meant to prevent monopolistic utility abuses, the Ninth Circuit in this case has completely disregarded this Court's decisions in four major cases and has held that a municipal electric utility may engage in any anticompetitive practices it desires in any business enterprise that is related to the sale of electrical power and light, and do so free from antitrust scrutiny.

Petitioners are thirteen electrical contracting companies who do business in the Sacramento, California area. Petitioners are trained and skilled in virtually all kinds of electrical construction work. Petitioners can and do construct, among other things, the electrical distribution equipment that carries electric energy from the property line of commercial and residential developments to the buildings within those developments. Petitioners also construct and maintain street lighting systems and outdoor security lighting systems. Competition in the electrical contracting industry is not regulated.

Respondent is Sacramento Municipal Utility District (hereinafter "SMUD"), a municipal utility district with monopoly control over the sale of electric energy within the geographic area it serves. A-59. In addition to the sale of retail electric energy SMUD is engaged in other business activity, which is separate from, albeit related to, the sale of electric energy. A-31. Specifically, SMUD is engaged in the electrical contracting business in which it constructs the very same electrical distribution and lighting systems as those which have been, which can be, and, to the extent SMUD in its sole discretion determines, which presently are constructed by private electrical contractors such as and including Petitioners. The construction here at issue is not the construction of facilities for SMUD's generation or transmission of energy; rather it is the local distribution equipment and end use appliances on private property that benefit a select customer. Indeed, SMUD competes with Petitioners for the very same customers. Accordingly SMUD is a competitor to petitioners.

SMUD is empowered by state statute to construct, own, operate and control works for supplying light and power; and to do all things necessary and convenient thereto. SMUD engages in the electrical construction business in issue pursuant to its own Rates, Rules and Regulations. Pursuant to those rates, rules and regulations SMUD precludes private contractors from competing for the distribution construction needed by a developer of a commercial or residential development. *See*, A-61. Indeed, *as a condition of providing energy* to a development, SMUD requires that SMUD do the electrical construction and maintenance needed by the developer. Thus, Petitioners and other firms are

completely foreclosed from those markets. SMUD constructs the lighting systems in issue at no charge to the developer or other property owner, but charges a monthly rate for energy *and* lighting which is slightly greater than that for energy alone. The cost of these types of construction is built into SMUD's rate structure. All SMUD rate payers become captive customers, forced to pay for the construction.[2] Petitioners and other firms cannot compete with SMUD's cross-subsidizing. SMUD's anticompetitive practices as to both distribution and lighting foreclose petitioners from competing for this work.

On November 15, 1979 Petitioners filed a Complaint in the United States District Court for the Eastern District of California, charging that SMUD's anticompetitive practices in the electrical contracting business violate the Sherman Act. SMUD raised as its Fifth Defense that its anticompetitive acts are not in violation of the Sherman Act because they constitute "state action" which the Sherman Act does not reach. Although two different judges in the District Court rejected SMUD's state action claim on two separate occasions, the Ninth Circuit reversed on the state action claim.[3]

The decision of the Ninth Circuit is in direct conflict with the holdings and policies of this Court as set forth in *Cantor v. Detroit Edison*, 428 U.S. 579, 96 S.Ct. 3110 (1976); *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 98 S.Ct. 1123 (1978);

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[2] In 1984 SMUD's rates to its customers were over $200,000,000; SMUD's expenditures for construction, including the work here at issue, were over $140,000,000. Source: SMUD 1984 Annual Report.

[3] The District Court (Ramirez, J.) denied SMUD's quest for immunity first when SMUD made a motion for judgment on the pleadings. 526 F. Supp. 276 (E.D.Cal. 1981). That decision is appended as Appendix D. A-15. That decision was not appealed. Later, on cross-motions for summary judgment on the state action issue, the District Court (Karlton, C.J.) again denied SMUD's claim of immunity and entered summary judgment on the Fifth defense for petitioners. The oral decision and the order of Chief Judge Karlton are appended as Appendices B and C, respectively. A-10; A-13. It is Chief Judge Karlton's decision that was appealed and reversed by the Ninth Circuit decision for which review is sought here.

Community Communications v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835 (1982); and *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985). Moreover, the Ninth Circuit Decision addresses the important issue of the application of the state action doctrine to a municipality that is engaged in a purely proprietary business enterprise in an industry in which the State has no policy as to the desireability or lack of desireability of competition.

The instant case is ideally suited for a disposition of this critical issue. The Respondent municipality is clearly engaged in a purely proprietary business enterprise in an area of the economy where there are countless private firms engaged in the same work, competing for the same customers. The state statutes involved are "typical" enabling statutes,[4] which do no more than authorize a general activity. Further, there is no question but that there is neither state policy nor state interest in regulating competition among electrical contracting firms or between electrical contracting firms and municipalities engaged in the same business activity. Thus, a decision by this Court would have broad applications to the full range of business activities in which countless municipalities are enabled to engage.

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[4] The statutes relied upon by the Ninth Circuit are included in Appendix H.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *CANTOR, CITY OF LAFAYETTE, CITY OF BOULDER* and *TOWN OF HALLIE* AND EFFECTS A GROSS MISCARRIAGE OF JUSTICE THAT WILL IMPACT COUNTLESS MUNICIPALITIES, CITIZENS AND BUSINESSES ACROSS THE COUNTY.

A. In Direct Conflict With *Cantor* The Ninth Circuit Decision Holds That An Electric Utility That Is Engaged In Monopolistic Abuses In Unregulated Competitive Areas Of the Economy Is Immune From The Antitrust Laws By Virtue Of The Very Statutes That Seek To Prevent Monopolistic Utility Abuses.

In *Cantor v. District Edison*, 428 U.S. 579, 96 S.Ct. 3110 (1976), a case remarkably factually analogous to this one, this Court readily acknowledged the obvious distinction between utility conduct subject to regulation and business activity in competitive markets. 428 U.S. at 596, 96 S.Ct. at 3120. In *Cantor*, the defendant was, like SMUD, an electric utility.[5] In *Cantor*, the defendant, like SMUD, was engaged in a purely proprietary business enterprise in addition to the sale of electric energy. Indeed, in *Cantor* the defendant like SMUD, was using electric energy rates to impose restraints in a competive area of the economy. 428 U.S. at 582-83, 96 S.Ct. at 3113-114. This Court held that the state action doctrine did not protect the anticompetitive conduct of the utility defendant in the *lightbulb business. Id.* at 598, 96 S.Ct. at 3121. In assessing the applicability of the state action doctrine this Court there reasoned:

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[5] A major distinction between *Cantor* and the instant case is that the defendant-utility in *Cantor* was a *private* utility whereas SMUD is a *municipal* utility. That distinction, however, is not pertinent to the instant analysis of the conflict with *Cantor* because the focus of this analysis is on the nature of the state regulatory policy, not the identity of the defendant.

> [A]ll economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation. There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.

428 U.S. at 595-96; 96 S.Ct. at 3120 (footnotes omitted).

The Ninth Circuit in the instant case totally ignored the reasoning and holding of *Cantor* in two important respects. First, the Ninth Circuit relied entirely on a statutory scheme designed not to *suppress competition*, but rather *to prevent monopolistic exploitation* by a natural monopoly electric utility. A-6-8. The Ninth Circuit relied on a statutory scheme designed to prevent monopolistic abuses *to confer immunity* for the very kind of monopolistic abuses the statutory scheme was meant to prevent.[6] Thus, the totally illogical result is that a statutory scheme meant to prevent SMUD from exploiting its monopoly over the sale of electric energy, forms the basis for immunizing SMUD for exploiting its monopoly over electric energy by suppressing competition in the electrical contracting business.

The second particular in which the Ninth Circuit disregarded *Cantor* was that it made no distinction between SMUD having to meet regulatory criteria insofar as it is exercising its *natural monopoly powers* in the sale of energy and SMUD having to meet antitrust standards to the extent it engages in the *electrical contracting business* in a competitive area of the economy. The Ninth Circuit, relying on "necessary or convenient" statutes, held that any business activity that might be considered necessary or convenient to the provision of electric power and light is therefore somehow subject to regulation by virtue of that nexus and thus must be immune from antitrust scrutiny. *See* A-8.

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[6] In fact, to the extent the Ninth Circuit relied explicitly upon the statutes it cited, those statutes are at best enabling statutes and evidence *no* state policy to displace competition.

Furthermore, the Ninth Circuit failed to address two additional factors considered by this Court in *Cantor* both of which would have demonstrated the error in the Ninth Circuit's analysis. First, the state of California has no independent regulatory interest in the electrical contracting business, just as Michigan had no interest in the lightbulb business. 428 U.S. at 584-85, 96 S.Ct. at 3114-15. Second, the restraints imposed by SMUD are most certainly not necessary to make the regulatory scheme which regulates the sale of electric energy work. 428 U.S. at 596-98, 96 S.Ct. at 3120-21.

The end result is that the lightbulb program that was not immune in *Cantor* would be immune in the Ninth Circuit under *Grason*. There is no functional distinction between Detroit Edison's lightbulb give away and SMUD's street light, security light, distribution system give away.[7] Moreover, given the breadth of the Ninth Circuit ruling, the anticompetitive acts of SMUD in any business that SMUD deems to be "convenient" to its monopoly sale of electric energy would also be immune. As such the Ninth Circuit decision effects a gross miscarriage of justice. While Lawrence Cantor can now sell lightbulbs in a free and open market, petitioners here are subjected to the monopolistic abuses of SMUD. This decision will impact thousands of businesses that find themselves competing with municipalities.[8]

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[7] While Detroit Edison's program was a pure give away, the cost of which was built into its rates, the effect of that program is the same as SMUD's program by which petitioners allege SMUD either gave away or nearly gave away street lighting, security lighting and electrical distribution systems. *See* A-35-36.

[8] In 1983 there were over 44,000 electrical contracting firms in the United States. Source: National Electrical Contractors Association, Washington, D.C. "In 1972, there were 62,437 different units of local government in this Country." *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 407, 98 S.Ct. 1123, 1134 (1978).

In 1983 the payroll for the electrical worker employees of the above electrical contractors exceeded $9 Billion. Source: National Electrical Contractors Association Washington, D.C.

B. In Direct Conflict With *City Of Lafayette*, The Ninth Circuit Decision Holds That A Municipality Engaged In A Purely Proprietary Business Enterprise Is *Ipso Facto* Immune From The Antitrust Laws.

In *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 98 S.Ct. 1123 (1978), this Court unambiguously held that a municipally owned electric utility is within the reach of the Sherman Act (435 U.S. at 408, 98 S.Ct. at 1134) and is *not ipso facto* exempt from the antitrust laws by virtue of its status as a political subdivision of a state. 435 U.S. at 411, 98 S.Ct. at 1136. Rather, to be entitled to the state action exemption, a municipality must demonstrate that its *anticompetitive activities* were authorized by the State pursuant to a state policy to displace competition with regulation or monopoly public service. 435 U.S. at 413, 98 S.Ct. at 1137; *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713, 1716 (1985). The Ninth Circuit decision, relying on *nothing more than* the municipal utility's authority to exist (its enabling legislation)[9] confers immunity for anticompetitive conduct that is not clearly articulated, affirmatively expressed or even in furtherance of any regulatory interest of the state. In other words, by virtue of its very existence *SMUD* is immune.

SMUD, like the City of Lafayette, is empowered to own and operate an electrical utility. 435 U.S. at 391, 98 S.Ct. at 1125. Naturally, SMUD is also empowered to do that which is necessary or convenient to exercise its power. Cal. Pub. Util. Code § 12801. A-76. Cited by the Ninth Circuit, among others, were statutes which permit SMUD to construct works for supplying

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[9] One statute cited by the Ninth Circuit was Cal. Pub. Util. Code Section 12809. The Ninth Circuit reads Section 12809 as authorizing SMUD to "fix its rates below cost." A-7-8. The Ninth Circuit found such authority to be a clear legislative imprimatur for displacement of competition. It appears that the Ninth Circuit seized upon the buzzwords "fix rates" and "below cost" as evidence of anticompetitive contemplation by the Legislature. In fact, the statute simply empowers a district to *not* set rates at an unreasonably high level, recognizing that all immediate costs need not be covered by rates because of a district's borrowing, bonding and taxing power.

light and power, to make contracts and to hire labor. A-75. To the extent that the Ninth Circuit relied upon these statutes to confer immunity, the decision is in bold conflict with *City of Lafayette*. The only way a municipal utility district can act is if it is empowered to do so. Thus, according to the Ninth Circuit, the power to engage in the provision of electric power and light, to make contracts and hire labor carries with it an implication that SMUD is authorized to do these things in an anticompetitive way. A-8. Accordingly, the mere fact of creating SMUD and empowering it to "be" and to "act" confers immunity for any act it is authorized to do. *Id.* This holding is in direct conflict with *City of Lafayette* and should not be permitted to stand. The effect of the Ninth Circuit decision is that of saying:

> If you are permitted by statute to engage in an act, that act is immune from antitrust scrutiny.

So, where SMUD is empowered to "make contracts" it would be authorized to make tying contracts, price fixing contracts, contracts to boycott or any other contract in restraint of trade. Where SMUD is authorized to "hire labor," it would be authorized to engage in anticompetitive hiring practices. And under the "necessary or convenient" power SMUD could engage in virtually any anticompetitive practice in any business if *SMUD* deemed it to be *convenient*.

The result is that the Ninth Circuit has developed its own test for municipal antitrust immunity:

Municipalities are *ipso facto* immune from the antitrust laws.[10]

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[10] It should be noted that *Grason v. Sacramento Municipal Utility District* is the most recent and clearly the most radical in a line of state action cases out of the Ninth Circuit wherein the Court has routinely granted immunity to municipal defendants. *See generally, Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985); *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *cert. granted on other grounds*, No. 85-390 November, 1985; *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790 (9th Cir. 1985); *Tom Hudson & Assoc. v. City of Chula Vista*, 746 F.2d. 1370 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3503 (1985); *Deak-Perera Hawaii, Inc. v. Dept. of Transportation*, 745 F.2d 1281 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1756 (1985); *Springs Ambulance*

Such a finding is in absolute conflict with *City of Lafayette*.

C. In Direct Conflict With *City Of Boulder*, The Ninth Circuit Decision Holds That The Anticompetitive Conduct Of A Municipality Is Immune From The Antitrust Laws Where The State Policy Is One Of Precise Neutrality.

In *Community Communications v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835 (1982) this Court addressed the issue of whether a home rule city enjoyed the same sovereign policy-making deference as a state in the context of the state action issue. *Id.* at 43, 102 S.Ct. at 836. This Court's answer was a resounding No. *Id.* at 56, 102 S.Ct. at 843. For the very reasons expressed in *City of Lafayette*, this Court rejected a claim of blanket immunity in *City of Boulder*. *Id.* This Court held that the anticompetitive conduct of Boulder was not immune unless it was action in furtherance or implementation of a clearly articulated and affirmatively expressed state policy. 455 U.S. at 52, 102 S.Ct. at 841. This is so because we are not a nation of city-states but of States. *Id.* at 54, 102 S.Ct. at 842.

Further, this Court held that legislative neutrality respecting the municipal actions challenged as anticompetitive does not satisfy the clear articulation and affirmative expression requirements. *Id.* at 55, 102 S.Ct. at 843. A state which allows municipalities to do as they please can hardly be said to have

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Service v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984); *Catalina Cablevision Assoc. v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984); *Golden State Transit v. City of Los Angeles*, 726 F.2d 1430 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1865 (1985). One notable exception to the routine grants of immunity was *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983) (per curiam), where the Ninth Circuit, *per curiam*, found that "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." 716 F.2d at 663-64 (quoting *City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 417, 98 S.Ct. 1123, 1138-39 and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-82, 390-91, & n.7, 93 S.Ct. 1022, 1029-32, 1035-36, & n.7 (1973) (Stewart J., concurring in part and dissenting in part)).

contemplated the specific anticompetitive actions for which municipal liability is sought. *Id.*

Here the California legislature has done no more than to enable SMUD to act, i.e., to provide light and power and construct works therefor, by a general grant of power. Whether SMUD engages in those activities in a competitive way or an anticompetitive way is left up to SMUD. SMUD may choose to exercise its powers in an anticompetitive way while another municipal utility may exercise its powers in a non-anticompetitive way. Under the Ninth Circuit opinion both ways would be equally contemplated by the powers granted. Acceptance of the proposition that this general grant of power implies authorization to engage in the authorized conduct in an anticompetitive way "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that (this Court's) precedents require." *Id.* at 56, 102 S.Ct. at 843.

A review of the enabling statute that forms the basis of the Ninth Circuit decision graphically displays the inherent conflict with this Court's ruling in *City of Boulder*. In addition to the portion of the enabling statute (Cal. Pub. Util. Code § 12801; A-76.) that is cited by the Ninth Circuit as authorizing SMUD to provide "light and power," SMUD is also empowered to:

> acquire, construct, own [and] operate works or parts of works for supplying the inhabitants of the district . . . with light, water, power, heat, transportation, telephone service, or other means of communication. . .

Cal. Pub. Util. Code § 12801; A-76. Accordingly, assuming cable television to be a means of communication, not only could SMUD regulate private competition in the cable television business, but could in fact operate a system as a proprietary business enterprise and engage in virtually any anticompetitive practice (contracts, hiring, rates) free from antitrust scrutiny.[11]

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[11] The spectre of SMUD engaging in restrictive practices in the cable television business, or for that matter, other mass-media or publishing businesses raises additional serious questions under the First Amendment. *See Preferred Communications v. City of Los Angeles*, 754 F.2d

While each of the activities authorized under the statutes relied upon by the Ninth Circuit *could be* carried out in an anticompetitive way, the choice of whether or not to do so is left to SMUD. "A state that allows municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is being sought." *City of Boulder, supra*, 455 U.S. at 55, 102 S.Ct. at 843.

The statutes relied upon by the Ninth Circuit are tantamount to the delegation of authority in *City of Boulder*. The state's policy is no more than granting authority to act. Indeed, the statutes relied on by the Ninth Circuit evidence nothing more than legislative neutrality.

D. In Direct Conflict With *Town of Hallie*, The Ninth Circuit Decision Holds That The Anticompetitive Business Activities Of A Municipality Are Immune From The Antitrust Laws Where Its Authorization To Act Does Not Evidence A State Policy To Displace Competition In The Matter In Issue.

In *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985), this Court unanimously held that "before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the *challenged activity* pursuant to a clearly expressed state policy." ____ U.S. at ____, 105 S.Ct. at 1717 (emphasis added). In *Hallie* the municipal defendant was engaged in the sewage treatment business as it was empowered by statute to be. The plaintiff town did not challenge the defendant's right to operate a sewage treatment plant, but rather the anticompetitive manner in which the defendant operated its facility. Specifically, the plaintiff challenged the refusal of the defendant to provide treatment services unless the plaintiff town agreed to annex to the defendant's district for sewage collection and treatment services.

In analyzing the question of how clearly articulated a state policy must be, this Court looked to the legislative scheme. *Id.* at ____, 105 S.Ct. at 1717. While the statutes did not specifically

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1396 (9th Cir. 1985), *cert. granted*, Case No. 85-390, November, 1985 (on First Amendment issue).

address the matter of competition in the collection business, this Court found that statutes on their face authorized the specific conduct (in form and manner) challenged in the case: conditioning treatment services on annexation. *Id.* at ____, 105 S.Ct. at 1718. This conduct was, by its terms, anticompetitive. That is, conditioning access to a monopoly resource upon restrictive terms *is anticompetitive*. Thus, the Court inferred that the State must have contemplated the anticompetitive acts. *Id.* at ____, 105 S.Ct. at 1719.

In the instant case the Ninth Circuit has relied on statutes which do not evidence legislative contemplation of anticompetitive effects, but in fact do no more than authorize the *general conduct* of engaging in electrical construction. A-75-78. These statutes, unlike those in *Hallie*, do not authorize either the specific conduct or any conduct which, by the terms of the statutes, is anticompetitive. Rather, the general conduct can be carried out either in a manner that is consistent with competition or in an anticompetitive manner, such as SMUD does.

Notwithstanding the absolute lack of a clearly expressed policy, the Ninth Circuit immunizes SMUD's conduct. The problems inherent in the Ninth Circuit ruling is apparent when the following rhetorical question is asked: What anticompetitive conduct related to "electrical light and power" can SMUD engage in that is *not immune* under the Ninth Circuit rule? Under the Ninth Circuit rule SMUD can not only do anything that is necessary or convenient to the provision of light and power but it can do so in an anticompetitive way. Thus, SMUD could give away light bulbs like Detroit Edison; it could wire the inside of houses; it could provide home and business lighting fixtures; it could give away appliances; it could condition its sale of energy on purchase of appliances from it and so on and so on, *ad infinitum*.

The policy underlying the *Town of Hallie* decision appears to be that State legislatures cannot be expected to catalog all of the anticipated effects of a statute. ____ U.S. at ____, 105 S.Ct. at 1719. Thus, this Court held that the statutes which inherently displace unfettered business freedom evidence a state policy to displace competition. ____ U.S. at ____, 105 S.Ct. at 1718. The Ninth Circuit decision is not consistent with the policy in *Town of*

Hallie. The Ninth Circuit decision takes *Town of Hallie* too far. There is nothing in the statutes relied upon that is inherently anticompetitive, nor which suggests that anticompetitive conduct would logically result. Indeed, if the existence of a state policy presumes an underlying state interest, the lack of any cognizable state interest in displacing competition in the electrical contracting business would seem to belie any anticompetitive policy.

The Ninth Circuit's misapplication of *Town of Hallie* should not be allowed to stand. This Court should provide guidance as to how far *Town of Hallie* can be taken. This Court must provide direction to the Ninth Circuit as well as the rest of the Circuits as to the proper application of this important principle.

II

THE QUESTION OF WHETHER MUNICIPALITIES THAT ARE ENGAGED IN PURELY PROPRIETARY BUSINESS ACTIVITIES ARE SUBJECT TO THE ANTITRUST LAWS IS AN IMPORTANT MATTER OF FEDERAL LAW WHICH SHOULD BE ADDRESSED BY THIS COURT.

A: The Instant Case Is One Of First Impression In This Court And Is Of Supreme Importance To This Nation's Municipalities, Businesses And Citizens.

The Chief Justice noted in *City of Lafayette* that municipalities often are engaged in "what is clearly a business activity; activity in which a profit is realized,"[12] (435 U.S. at 418, 98 S.Ct. at 1139,

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[12] These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be

Burger, C.J. concurring in part and concurring in judgment), and that

> [t]here is nothing in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 86 L.Ed. 315 (1943) or its progeny, that suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality.

Id. Some municipal actions come within the broad regime of "traditional municipal functions." For example, enactment of ordinances in exercise of the municipal police power,[13] or the provision of sewage collection and treatment services.[14] A municipality may, however, also engage in activity which is a purely proprietary business enterprise. The Chief Justice in *City of Lafayette* noted there:

> It should be evident, I would think, that the running of a business is not an integral operation in the area of traditional government functions. [Citations omitted.] . . . Even if this proposition were not generally true, the particular undertaking at issue here—the supplying of *electric service*—has not traditionally been the perogative of the State.

435 U.S. at 424, 98 S.Ct. at 1142 (Burger, C.J., concurring in part and concurring in judgment) (emphasis added). In the instant case the municipality is engaging in business activity even more remote from traditional governmental functions than selling energy. It is, pure and simple, engaged in the electrical con-

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introduced at odds with the comprehensive national policy Congress established.
City of Lafayette, 435 U.S. at 408, 98 S.Ct. at 1134 (Opinion of Brennan, J.) (footnotes omitted.)

[13] *See Fisher v. City of Berkeley*, 37 Cal. 3d 644 (1984), *prob. juris. noted*, ____ U.S. ____, 105 S.Ct. 2653, *argued*, Nov. 12, 1985.

[14] *See Town of Hallie v. City of Eau Claire*, ____U.S. ____, 105 S.Ct. 1713 (1985).

tracting business. Thus, this case is distinguished from the other state action cases that have been before this Court.[15]

When a municipality is engaged in a proprietary business enterprise different considerations should come into play than in a case of an exercise of municipal functions. The test set out by the Chief Justice in *City of Lafayette* may be one approach:

> I would therefore remand, directing the District Court to take an additional step beyond merely determining—as the plurality would—that any area of conflict between the State's regulatory policies and the federal antitrust laws was the result of a "state policy to displace competition with regulation or monopoly public service." . . . This supplemental inquiry would consist of determining whether the implied exemption from federal law "was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.'" [*Cantor v. Detroit Edison*], 428 U.S., at 597, 96 S.Ct., at 3120.

435 U.S. at 425-26, 98 S.Ct. at 1143 (Burger, C.J. concurring in part and concurring in judgment) (footnotes omitted).

Clearly a resolution of this issue is essential as more and more municipalities engage in business activities in direct economic confrontation with businesses both within and without their political boundaries. Without some limitation on the anticompetitive business practices of municipalities, restraints can and will occur in a variety of industries. As pointed out above, SMUD's enabling statutes permit it to engage in the provision of "light, water, power, heat, transportation, telephone service, or other means of communication," thus logically SMUD could sell lightbulbs, bottled water, flashlight batteries, heating systems, automobiles, telephones or even cable television service—and do so in an anticompetitive way.

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[15] *City of Lafayette* addressed the narrow issue of whether a municipality is entitled to the protection of the state action doctrine by virtue of its status. It did not address the question of what state policy is required to protect a municipality engaged in proprietary business activity.

If the law, as interpreted, permits municipalities to engage in these business enterprises, even if it is under authorization by the state, and to be immune from antitrust scrutiny, then the interpretation ought to be changed.[16]

It may also be appropriate to subject a municipality that is engaged in a proprietary enterprise to a different standard insofar as state supervision is concerned. *Compare, California Retail Liquor Dealers Association v. Midcal Aluminum,* 445 U.S. 97, 106, 100 S.Ct. 937, 943 (1980) with *Town of Hallie v. City of Eau Claire,* ___ U.S. ___, 105 S.Ct. 1713, 1720-21 (1985). Truly the success of an antitrust action should depend on the nature of the activity challenged not the identity of the defendant. *Southern Motor Carriers Rate Conference v. United States,* ___ U.S. ___, 105 S.Ct. 1721, 1728 (1985) (Powell, J.), (citing *City of Lafayette,* 435 U.S. at 420, 98 S.Ct. at 1140 (Burger, C.J. concurring in part, and concurring in judgment)).

To allow municipalities, and especially municipal utilities to engage in proprietary business activities in competitive areas of the economy, free from antitrust scrutiny, is inconsistent with the nation's policy toward deregulation. Allowing state action immunity in cases such as the instant case will insulate a vast sector of our economy from the antitrust laws and eliminate the benefits of competition that the laws are designed to increase.

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[16]The Chief Justice in *City of Lafayette* said:

> Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to a "state action" analysis under *Parker.* That is, we should not treat the result in the *Parker* case as cast in bronze; rather, the scope of the Sherman Act's power should parallel the developing concepts of American federalism.

435 U.S. at 421, n.2, 98 S.Ct. at 1141, n.2 (Burger, C.J., concurring in part and concurring in judgment) (emphasis in original).

Another factor that makes the issue presented by this case important is that the Local Government Antitrust Act of 1984 (15 U.S.C. §§ 34, 35 and 36) prohibits the imposition of any monetary relief, including attorneys fees and costs, against any municipality that violates the antitrust laws. By eliminating monetary relief, Congress also eliminated any incentive for private litigants to act as private attorneys general to enforce the antitrust laws against municipal violators. Thus, because there is no risk of damage awards, municipalities engaged in business activity are going to more likely to engage in anticompetitive conduct. More reason, then, exists to carefully advise municipalities as to whether the antitrust laws reach their proprietary activities.

B. The Impact Of The Ninth Circuit Decision, If It Is Allowed To Stand, Will Be To Severely Disrupt The Nation's Free Market Policies In A Number Of Substantial Industries.

The miscarriage of justice effected by the Ninth Circuit decision is apparent when the immediate impact on the parties to this case is examined. Petitioners, private electrical contractors, doing business in an unregulated industry, are not free to ply their trade. Rather, SMUD in its absolute discretion determines what customer petitioners can have and which customers SMUD will take; and, what work petitioners can do and what work SMUD will do. By requiring that customers comply with SMUD's rules and rates as a condition of receiving SMUD's monopoly electric energy, SMUD is able to pick and choose the electrical contracting work that it will do and that which it will allow petitioners and other electrical contractors to do. In the case of an industrial development one of petitioners might do the entire electrical contracting work for the entire electrical distribution system while, in the very next lot SMUD may, as a condition of providing its energy to the developer require that SMUD act as the electrical contractor in the job.[17]

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[17] An extreme example of SMUD's power to arbitrarily shape the market is where under its rules SMUD permits a private contractor to install a conduit for a developer, but not the wire that goes into the conduit. SMUD requires that it install the wire—but to do so it uses a pull rope installed in the conduit by a private contractor!

By virtue of the lack of specificity in the purported state policy displacing competition and the lack of specificity with regard to the purported authorization to engage in anticompetitive acts, SMUD can as a practical matter engage in any anticompetitive conduct which is as remote as SMUD's competitive electrical contracting practices. In other words since the Ninth Circuit decision found a policy to displace competition in the matter of providing power and light, SMUD could in fact engage in the very same lightbulb give away program condemned in *Cantor v. Detroit Edison*. Moreover, if SMUD finds it necessary or convenient to install street lighting systems at anticompetitively low prices it is equally authorized to provide any electrical consuming appliance and couple the cost of that appliance with the charge for energy and thus displace competition in that market. The effect would be a finding that the State of California has a policy to displace competition in the sale of typewriters, toasters and television sets. Since gasoline is a form of power, as are kerosene and wood, SMUD and other municipalities could monopolize each of these markets too. SMUD and other municipalities could put other competitors out of business in these areas too.

To allow the Ninth Circuit decision to stand will create precedent which confers upon municipalities a blanket immunity for engaging in proprietary business activity which effectively overrules the decisions by this Court in *City of Lafayette* and *City of Boulder*. For if a municipality, by virtue of enabling legislation, is empowered to engage in a business; and, further legislation allows it to do that which is necessary and convenient to carrying out its business that is within the scope of the statute, the municipality is *ipso facto* immune from the antitrust laws. This Court has held that a state policy displacing competition must be clearly articulated and affirmatively expressed. The result of the Ninth Circuit decision alone amply demonstrates the unworkability of its holding. Moreover, the result is absolutely inconsistent with the policy of the antitrust laws and the rulings of this Court.

C. This Case Provides An Ideal Vehicle For Determining The Issue Of When A Municipality That Is Engaged In A Proprietary Enterprise Is Immune From The Antitrust Laws.

Several factors render the instant case one which is ideally suited to treat the matter of the application of the antitrust laws to the proprietary business conduct of municipalities.

The statutes under which the respondent has engaged in the electrical contracting business are typical of the enabling statutes under which countless cities, towns and municipal districts operate. *See e.g. City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 391, 98 S.Ct. 1123, 1125 (1978). Thus, a decision by this Court would have a broad application that would provide guidance to municipalities and businesses throughout the nation.

The business enterprise engaged in by respondent in this case is purely a proprietary business enterprise. Thus, the narrow issue of a municipality engaged in a proprietary business enterprise can be addressed. Moreover, while the business in the instant case is electrical contracting, that business is clearly analogous to a variety of businesses that municipalities can or do engage in. Thus, this case can provide significant guidance for a broad range of municipal conduct.

The Ninth Circuit decision will be bad precedent and should not be allowed to stand. If the Ninth Circuit decision stands, its precedent will adversely impact thousands of cities, businesses and citizens[18] throughout the Ninth Circuit as well as those Circuits that may look to the Ninth Circuit decision. Because the Ninth Circuit purportedly relied upon the decisions of this Court, the danger exists that the Ninth Circuit's misinterpretation of the law will be relied upon by others.

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[18] In 1984 SMUD had over 350,000 customers. Source: SMUD 1984 Annual Report. In 1984 there were over 400,000 electrical worker employees of electrical contractors throughout the nation, with a payroll of over $9 Billion. Source: National Electrical Contractors Association, Washington, D.C.

The nation is undergoing a movement of de-regulation. The business at issue in this case is analogous to the unbundling in the telecommunications industry. Where once the natural monopoly providers of telephone service would include within that monopoly all equipment and services related thereto, technology and the national policy of competition have unbundled the industry. The result of the Ninth Circuit decision is an anachronistic approval of the bundling of electrical services. Thus, the instant case is timely insofar as it addresses, in a broad sense, the deregulation or unbundling issue.

Finally, the Ninth Circuit decision has clearly effected a miscarriage of justice that should be corrected by this Court.

CONCLUSION

The state action doctrine is a narrowly defined exception to the "heavy presumption against implicit exemptions" from the Sherman Act. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787, 95 S.Ct. 2004, 2013 (1975), *see also City of Lafayette v. Louisiana Power and Light*, 435 U.S. 389, 398, 98 S.Ct. 1123, 1129 (1978). And the antitrust laws are "the Magna Carta of free enterprise." *United States v. Topco*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135 (1972). *See also City of Boulder, supra*, 455 U.S. at 56, n.19, 102 S.Ct. at 843, n.19; *City of Lafayette, supra*, 435 U.S. at 398, n.16, 98 S.Ct. at 1129, n.16. Yet, the Magna Carta of free enterprise becomes an impotent law with its policies subverted where municipalities acting under enabling statutes can engage in purely commercial activity to the detriment of the economy. As Justice Brennan has said:

> [T]he economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of the national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders.

City of Lafayette, 435 at 403, 98 S.Ct. at 1131. For all of the reasons stated herein, your Petitioners respectfully pray that this Petition for a Writ of Certiorari be granted.

December 2, 1985

Respectfully submitted,

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Appendix A

Grason Electric Company, a California Corporation,
Luppen and Hawley, Inc., a California Corporation,
M and M Electric Company, a California Corporation, et al.,
Plaintiffs/Appellees,

v.

Sacramento Municipal Utility District,
Defendant/Appellant.

No. 84-2395.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 15, 1985.
Decided Sept. 4, 1985.

Appeal from the United States District Court for the Eastern District of California.

Before POOLE, NELSON and BRUNETTI, Circuit Judges.

NELSON, Circuit Judge:

Sacramento Municipal Utility District ("SMUD") appeals from the district court's grant of partial summary judgment striking its state action immunity defense and denial of its summary judgment motion seeking dismissal of the action on the ground of state action immunity, in this antitrust action brought by thirteen electrical contractors ("plaintiffs"). Especially in light of the Supreme Court's recent decision in *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), we reverse the grant of partial summary judgment and the denial of SMUD's summary judgment motion. Because we find that SMUD is entitled, as a matter of law, to state action immunity, we remand to the district court with instructions to dismiss the action on that ground.

ISSUES PRESENTED

The broad issue is whether the district court erred in striking SMUD's state action immunity defense and in refusing to dismiss plaintiffs' action on the ground of state action immunity.

While the parties differ somewhat on specific formulation, both agree that final resolution of the broader issue raised depends on the resolution of two "sub-issues:" (1) whether the statutory scheme here evidences a sufficiently clear and affirmative state policy to displace competition, and (2) whether a municipality must show "active state supervision" of its anti-competitive conduct.

FACTUAL AND PROCEDURAL BACKGROUND

SMUD is a public entity created pursuant to state statute and is virtually the exclusive supplier of retail electricity in and around Sacramento, California. Plaintiffs are thirteen electrical contractors who do business in the same geographical area. Plaintiffs construct electrical distribution systems on private property, as well as street and outdoor lighting systems.

The plaintiffs brought an antitrust action against SMUD, alleging that SMUD violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by monopolizing the markets for electrical distribution systems on private property and for street and outdoor lighting systems. Plaintiffs do not appear to allege that SMUD's monopoly in the electrical energy market is illegal, but rather that it used that monopoly to gain an anticompetitive advantage in two related markets.

The procedural history of the motions involved in this appeal is somewhat convoluted. SMUD filed a motion for judgment on the pleadings on its state-action immunity defense on June 12, 1981. On the same day, plaintiffs filed a motion for summary judgment, in the alternative a motion for partial summary judgment to strike SMUD's defenses ("plaintiffs' motion to strike"). The district court, Hon. Raul Ramirez, denied SMUD's motion for judgment on the pleadings and certified his order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *Grason Electric Co. v. Sacra-*

mento Municipal Utility District, 526 F.Supp. 276, 280 (E.D.Cal. 1981). Judge Ramirez did not rule on the plaintiffs' motion to strike, instead ordering a three-month continuance. *Id.* at 281.

Before plaintiffs' motion could be heard, however, Judge Ramirez recused himself and the matter was reassigned to the Honorable Lawrence K. Karlton. In September, 1983, Judge Karlton issued an order denying plaintiffs' motion for summary judgment on issues not here on appeal. *Grason Electric Co. v. Sacramento Municipal Utility District*, 571 F.Supp. 1504 (E.D.Cal. 1983). Plaintiffs' motion to strike remained pending. Judge Karlton authorized SMUD to file a cross-motion for summary judgment on the state action defense. On April 30, 1984, Judge Karlton issued an order granting plaintiffs' motion to strike and denying SMUD's cross-motion. SMUD sought section 1292(b) certification, and the court filed the required certification statement on July 17, 1984. SMUD petitioned this court on July 23, 1984, for permission to appeal, and on August 30, 1984, permission was granted.

STANDARD OF REVIEW

The district court's determination of the applicability of state action immunity is a question of law subject to *de novo* review. *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1432 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). The district court's interpretation of state law is reviewed *de novo*. *In re McLinn*, 739 F.2d 1395, 1397-1403 (9th Cir. 1984) (en banc).

We also review the district court's grant or denial of a summary judgment *de novo*. *See, e.g., Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1482 (9th Cir. 1985). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Arizona Laborers Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515 (9th Cir. 1985); Fed.R.Civ.P. 56(c).

DISCUSSION

I. CLEARLY ARTICULATED STATE POLICY REQUIREMENT

A. *Introduction: the legal test*

This Circuit has stated that

> to qualify for *Parker v. Brown* [317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), *i.e.*, state action] immunity, a city need only show that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and that the legislature contemplated that that policy might be implemented by the kind of actions challenged as anticompetitive.

Tom Hudson & Associates, Inc. v. City of Chula Vista, 746 F.2d 1370, 1373 (9th Cir.1984), *cert. denied*, ____ *U.S.* ____, 105 S. Ct. 3503, 87 L.Ed.2d 634 (1985). *Accord, Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1411-12 (9th Cir.1985); *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790, 793 (9th Cir.1985); *Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir.1984).

This test was most recently used by the Supreme Court in *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). In *Town of Hallie*, the Court concluded that the relevant Wisconsin statutes

> evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation in the area of municipal provision of sewerage services. These statutory provisions plainly show that " 'the legislature contemplated the kind of action complained of.' " *City of Lafayette* [*v. Louisiana Power & Light Co.*, 435 U.S. 389, 415, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978)] (quoting the decision of the Court of Appeals, 532 F.2d 431, 434 [(5th Cir.1976)]). This is sufficient to satisfy the clear articulation requirement of the state action test.

105 S.Ct. at 1719 (footnote omitted).

B. *The district court's flawed legal analysis*

An analysis of the district court's reasoning is somewhat difficult here because Judge Karlton provided only a brief explanation of his thoughts concerning the state action immunity issue, and referred only in passing to Judge Ramirez, statements on the same issue. In his ruling from the bench, Judge Karlton said that "although this Court's analysis would be somewhat different from that undertaken by Judge Ramirez, if I had to start all over again, I am certain that the result articulated by Judge Ramirez is the right result.... The Court is satisfied that under the law of the case,[1] it would be necessary to grant summary judgment [for plaintiffs]." Before he recused himself, Judge Ramirez found that the state action immunity defense was inapplicable because the statutes were permissive rather than compulsory, 526 F.Supp. at 278-79, and because the requisite state policy cannot be shown by inference, *id.* at 280.

Judge Ramirez' two stated rationales are legally incorrect: the statutes need *not* be compulsory, and state policy may be inferred from the "broad authority to regulate," 105 S.Ct. at 1718. The Court in *Town of Hallie* found sufficiently "clear articulation" where the state statutes "clearly contemplate that a city *may* engage in anticompetitive conduct." *Id.* (emphasis added). Writing for a unanimous Court, Justice Powell stated that

> [i]t is not necessary ... for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. Applying the analysis of *City of Lafayette [v. Louisiana Power & Light Co]*., [435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978),] it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate.

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[1] The "law of the case" doctrine "ordinarily precludes a court from reexamining an issue previously decided by the same court in the same case." *Russell v. C.I.R.*, 678 F.2d 782, 785 (9th Cir.1982).

Id. The Court thus made clear that the state statutes need not "compel" anticompetitive conduct; rather, said the Court, "although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy." *Id.* at 1720.

C. *Analysis of state statutory scheme*

The constitutional authority for municipalities to create public utilities is found in the California Constitution, article XI, section 9, which provides that "[a] municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation or means of communication." SMUD's statutory authority derives from several sections of the California Public Utilities Code. Section 12801 authorizes SMUD to

> acquire, construct, own, operate, control or use . . . works or part of works for supplying the inhabitants of the district . . . with light [and] power, . . . and may do all things necessary or convenient to the full exercise of the powers herein granted.

Cal.Pub.Util.Code § 12801 (West 1984). SMUD is further empowered under section 12721 to "do all acts necessary and convenient for the full exercise of the powers granted" by statute, including the power to make contracts and to hire labor. Other statutes authorize SMUD to borrow money and sell bonds (section 13091)[2]; to exercise the right of eminent domain (section

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[2] Calif.Pub.Util.Code section 13091 (West 1984) provides:

> A district may borrow money from time to time for the purpose of constructing, reconstructing, replacing, extending or improving its system for supplying the district and its inhabitants with electric energy, and may issue and sell bonds to evidence the indebtedness created by such borrowing. No such money may be used:
>
> (1) For constructing or improving works located outside the district boundaries which exist on the date this Chapter . . . is enacted.
>
> (2) For acquiring any property owned by a public utility.
>
> (3) For constructing or improving works used, or to be used, in whole or in part either for the receipt, transmission and delivery of

12703)[3]; to tax (section 12892)[4]; to annex territory into the district's boundaries (section 13651)[5]; and to spend money for certain types of advertising (section 12819)[6]. SMUD is also authorized to fix its rates below cost, which appears to represent, as SMUD argues, a clear legislative imprimatur for displacement of competition. Section 12809 provides that SMUD "is not

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electric energy for any supplier of electric power or for the exchange of electric power with any person or entity. This provision shall not prevent the district from using such money for the purposes set forth in the initial sentence of this section.

Such bonds shall not be issued for a term in excess of 20 years after the date of such bonds; provided, that this sentence shall not limit the power of a district to refund such bonds.

[3] Calif.Pub.Util.Code section 12703 (West 1984) provides that "[a] district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this division."

[4] Calif.Pub.Util.Code section 12892 (West 1984) provides:

If, in the opinion of the board, the revenues will not be sufficient for any and all lawful purposes the board shall levy a tax for such purpose or purposes and fix the amount of money necessary to be raised therefor by taxation.

[5] Calif.Pub.Util.Code section 13651 (West 1984) provides:

Any public agency or portion thereof or unincorporated territory within the boundaries of a district . . . not included within the boundaries of a special district may be annexed thereto in the manner provided in this article.

[6] Calif.Pub.Util.Code section 12819 (West 1984) provides:

(a) Every district furnishing light, heat, or power shall expend no funds for advertising when such advertising encourages increased consumption of such services or commodities.

(b) Nothing in this section shall prohibit a district furnishing light, heat, or power from expending funds for advertising which encourages the more efficient operation of the facilities, works, or utilities of the district, or for advertising which encourages the more efficient use of light, heat, or power, the conservation of energy or natural resources, or presents accurate information on the economical purchase, maintenance, or use of any appliance or device using light, heat, or power.

required to fix a rate which in its opinion is unreasonably high, nor to cover by rates large expenditures and the interest thereon required for future needs and developments." Cal.Pub.Util.Code § 12809 (West 1984).

These state statutes appear to represent at least as broad a grant of authority to regulate as those involved in *Town of Hallie*. There, the Court found sufficiently "clear articulation" in a statutory scheme which authorized the city to provide sewage services. *See* 105 S.Ct. at 1717-19. We recently reaffirmed our view that "[n]arrowly drawn, explicit delegation is not required." *Preferred Communications,* 754 F.2d at 1413. Also, as SMUD points out, this Circuit has applied state action immunity in cases involving less comprehensive regulatory schemes than that which is involved here. *See Golden State Transit,* 726 F.2d 1430 (statute providing for state regulation of taxicabs if cities did not regulate held to provide basis for municipality's immunity); *Springs Ambulance Service,* 745 F.2d 1270 (statute providing that "city may contract for ambulance service to serve the residents of the city as convenience requires" held to evidence sufficiently clear articulation).

Thus, we conclude that the statutes here evidence a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of electrical power and light. *See Town of Hallie,* 105 S.Ct. at 1721. These statutes "clearly contemplate that [SMUD] may engage in anticompetitive conduct" such as that alleged by the plaintiffs; it is apparent "that anticompetitive effects logically would result from this broad authority to regulate." *Id.* at 1718.

D. *Evidence of legislative action*

To bolster its position, SMUD recounts the histories of four unsuccessful private attempts to amend the statutes to allow competition in the areas which are the subject of this action. In the sixties and seventies, the legislature had before it bills which would have allowed private contractors to construct outdoor lighting and underground electrical systems, but in each instance the legislature declined to change the status quo. While such information is not conclusive, of course, it certainly supports the

assertion that the legislature was made aware of and declined to interfere with SMUD's anticompetitive conduct. Despite the failure of these earlier efforts at changing the law, we believe that the legislature, not the courts, remains the proper forum in which to urge revision in SMUD's statutory grant of power.

II. ACTIVE STATE SUPERVISION

Town of Hallie resolves the issue of whether SMUD must show "active state supervision" in order for the state action immunity defense to apply. The Court held that the state need not activity supervise the alleged anticompetitive conduct when the actor is a municipality. 105 S.Ct. at 1720-21. *Accord, Preferred Communications,* 754 F.2d at 1412. SMUD has been held to be a "municipal district" performing a "governmental function." *Pacific Gas & Electric Co. v. Sacramento Municipal Utility District,* 92 F.2d 365, 369 (9th Cir. 1937), *cert. denied,* 303 U.S. 640, 58 S.Ct. 610, 82 L.Ed. 1100 (1938). Even prior to *Town of Hallie,* this Circuit had held that active state supervision is not required when the challenged activity is within a municipality's traditional function. *See Golden State Transit Corp.,* 726 F.2d at 1434.

CONCLUSION

Our analysis of the state statutory scheme shows that SMUD is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and that the legislature contemplated that the policy might be implemented by the kind of actions challenged as anticompetitive. Therefore, SMUD is immune from antitrust liability based on the state action immunity doctrine, and the district court erred in holding to the contrary. The district court's grant of partial summary judgment for plaintiffs, and its denial of SMUD's summary judgment motion are therefore reversed. The case is remanded to the district court with instructions to dismiss the action.

REVERSED AND REMANDED.

Appendix B

In The United States District Court
For the Eastern District of California

Before the Honorable Lawrence K. Karlton, Chief Judge.

Case No. Civ. S-79-861

Grason,
Plaintiff,

vs.

Sacramento Municipal Utility District,
Defendant.

February 9, 1984

Judge's Decision

February 9, 1984
11:00 A.M.
Sacramento, California

THE COURT: The court is prepared to rule. I really think I am prepared to rule on everything, but I am going to take one under. I am not going to spend—well, I better not say that. Who knows what I am going to do.

The affirmative Defenses 2, 3, 4, 9, and 10, by stipulation of the defendants, may be stricken and are now ordered stricken.

Concerning Defense No. 5, although this Court's analysis would be somewhat different from that undertaken by Judge Ramirez, if I had to start all over again, I am quite certain that the result articulated by Judge Ramirez is the right result. There are no cases that have subsequently come down which would in any way undermine that stutation.

The Court is satisfied that under the law of the case, it would be necessary to grant summary judgment. But an independent evaluation applying the principles applicable to the state action, so-called state action defense, would in any event result in the same consequence, and accordingly, summary judgment on the 5th affirmative defense is granted.

The 6th affirmative defense —

MR. SUSK: For the plaintiff, Your Honor.

THE COURT: —relates to some form of governmental immunity defense. The Court believes that this is also without merit. The City of Boulder squarely held that the city was not entitled to the state-action-Parker-type of defense by virtue of its status as a municipality. The policy behind the City of Boulder's refusal to extend sovereign immunity to municipality, simply includes extension of immunity in this case. The City of Boulder was careful to note that it was only state and the federal governments that are sovereigns, and it seems to be no basis, other than the plurality of the view, that under some unspecified circumstances, some fashion of local governing body may be proper. I do not know how to reconcile a policy basis with a statute. The statute says that every person, incorporation, and by reading its historical background, the Court determined that those terms did not encompass the state. There is no basis other than rewriting the statute to provide a municipality with an immunity which Congress did not give it, and sovereignty does not give it. It may well be that Congress made a wrong judgment, but that is neither for the Supreme Court nor for me to decide. That is for Congress to provide within its power.

The 6th affirmative defense is found without merit, and summary judgment is granted.

The 7th affirmative defense, which is an ingenious argument that the state may condition access to the Federal Courts is rejected because it is inherently simply not in accordance with the law. Again, of course, to the degree that we talk about sovereignty because you may not sue those possessed of sovereign immunity without their consent. They may condition that consent, but because the city does not have the sovereign immunity, the state's effort to condition suit against them is simply of no effect if it were demonstrated that it might be that intention.

As I noted, Lincoln County versus Luning, 133 U.S. 529, specifically says that counties do not enjoy sovereign immunity of the state. The summary judgment as to the 7th is granted.

As to the 11th cause of action, although I believe that this oral argument has been helpful in that it has really explained to me and helped me understand where we are, and I do not believe that it can stand as an affirmative defense in the sense that it would defeat plaintiff's right to a judgment, I want to go back and reread it carefully and think it through, but I do want the parties to understand that if the Court does grant summary judgment on the 11th affirmative defense as an affirmative defense, that would not, in the Court's view, preclude the state—you have me doing it, counsel—SMUD from tendering evidence relating to the propriety and the form and scope of the order, though I am inclined to believe that plaintiff is right, that it is irrelevant to the question of whether or not there has been an antitrust violation. Moreover, given the peculiar facts of this case, I cannot conceive of how the defendant could plead an affirmative defense of the nature that we have been discussing here today. But those are just musing remarks, and the Court will seek to determine whether there is anything to be talked finally about the issue after rereading the cases.

My law clerk is concerned that it was not clear, because we are on cross-motions for summary judgment, that granting of all the motions for summary judgment is plaintiff's motion for summary judgment and thus defendant's motions as to each one which has been granted for plaintiff is denied as to the defendant.

MR. SUSK: Would you like me to prepare an order?

THE COURT: Would you prepare an order as to—I am just wondering whether I cannot get the—no. Prepare an order on everything else, will you please, counsel.

MR. SUSK: Thank you, Your Honor.

THE COURT: Stand in recess.

(Court adjourned)

Appendix C

United States District Court
Eastern District of California

No. Civ. S-79-861-LKK

Grason Electric Company, et al,
Plaintiffs,

vs.

Sacramento Municipal Utility District,
Defendant.

[Filed July 17, 1984]

Amended Order Granting Plaintiffs' Motion For Summary Judgment, Denying Defendant's Motion for Summary Judgment, and Certifying Issue for Interlocutory Appeal

Plaintiffs' Motion for Summary Judgment and to Strike the Defendant's Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Defenses and defendant's Motion for Summary Judgment of its Fifth Defense came regularly on for hearing on February 9, 1984, at 9:00 a.m. Defendant's Motion for Certification for Interlocutory Appeal under 28 U.S.C. § 1292(b) as to its Fifth Defense, came regularly on for hearing on July 16, 1984 at 10 a.m. Appearing as counsel for plaintiffs were Robert A. Susk and Leslie J. Mann of the Law Offices of Robert A. Susk, and G. Joseph Bertain, Jr. of the Law Offices of G. Joseph Bertain, Jr. Appearing as counsel for the defendant were Ronald F. Lipp, J. Keith McKeag of Downey, Brand, Seymour & Rohwer, and David S. Kaplan.

After a full hearing and after full consideration of all relevant pleadings and papers on file with the Court and of oral argument of counsel and for good cause shown,

IT IS HEREBY ORDERED THAT:

Pursuant to defendant's stipulation, plaintiffs' Motion to Strike Defendant's Second, Third, Fourth, Ninth and Tenth Defenses in GRANTED and said defenses are hereby stricken.

IT IS FURTHER ORDERED THAT:

Plaintiffs' Motion for Summary Judgment on Defendant's Fifth, Sixth and Seventh Defenses is GRANTED.

IT IS FURTHER ORDERED THAT:

Defendant's Motion for Summary Judgment on its Fifth Defense is DENIED.

Defendant's Motion for Certification for Interlocutory Appeal under 28 U.S.C. § 1292(b) is granted as to the Fifth Defense. The Court is of the opinion that the issue of state action immunity involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of this issue may materially advance the ultimate termination of this litigation.

IT IS SO ORDERED.

DATED: July 17, 1984.

/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton
Chief Judge

Appendix D

Grason Electric Company, et al.,
Plaintiffs,

v.

Sacramento Municipal Utility District,
Defendant.

No. Civ. S-79-861 RAR.

United States District Court,
E. D. California.

Nov. 23, 1981.

As Amended Nov. 30, 1981.

MEMORANDUM

RAMIREZ, District Judge.

Defendant's Motion for Judgment on the Pleadings and plaintiffs' Motion to Strike Defendant's Fifth and Eighth Defenses came on regularly for hearing before the Honorable Raul A. Ramirez on October 5, 1981. G. Joseph Bertain, Esq., Robert A. Susk, Esq., and Leslie J. Mann, Esq., appeared on behalf of the plaintiffs, GRASON ELECTRIC COMPANY, et al. John F. Downey, Esq., Edward R. Coulson, Esq., and Ronald F. Lipp, Esq., appeared on behalf of the defendant, SACRAMENTO MUNICIPAL UTILITY DISTRICT.

Having read and considered all memoranda filed herein, having heard and considered the able arguments of counsel, and being fully advised of all premises involved herein, the Court now renders the following Memorandum and Order:

I

Defendant's Motion for Judgment on the Pleadings is predicated on the contention that it is entitled to immunity from liability for the conduct of which plaintiffs complain. In essence, defendant claims immunity on the grounds that its action is "state action," *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

In regard to the issue of "state action," the Court finds that neither the defendant nor its Board of Directors is a state agency; both are political subdivisions of the state, *Pacific Gas & Electric Co. v. Sacramento Municipal Utility District,* 92 F.2d 365 (9th Cir. 1937); *East Bay Municipal Utility District v. Railroad Comm'n,* 194 Cal. 603, 229 P. 949 (1924). Additionally, the Court finds that the mere fact that the defendant is a creature of statute is irrelevant; more important are the facts that the defendant is not dependent upon the State Treasury for the funding of its activities and that the state does not designate or select the individuals who will make policy for the defendant. For these reasons, the Court concludes that the defendant is a political subdivision of the state, and not a state agency. *See also Environmental Defense Fund v. East Bay Municipal Utility District,* 20 Cal.3d 327, 350, 142 Cal.Rptr. 904, 572 P.2d 1128 (1977); *East Bay Municipal Utility District v. Appellate Department,* 23 Cal.3d 839, 153 Cal.Rptr. 597, 591 P.2d 1249 (1979).

The distinction, as drawn herein, is critical inasmuch as a plurality of the United States Supreme Court has decided that the state action immunity doctrine established by *Parker v. Brown, supra,* does not have the same scope in the case of a municipality as it does in the case of the state *qua* state:

> [Our prior] decisions require rejection of petitioners' proposal that their status as such automatically affords governmental entities the "state action" exemption . . . . *Parker*'s limitations of the exemption to "official action directed by a state," 317 U.S., at 351, 63 S.Ct., at 313, is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 at 411, 98 S.Ct. 1123 at 1136, 55 L.Ed.2d 364 (1978).

The United States Supreme Court held further that a political subdivision of the state may be entitled to claim immunity from liability for allegedly anticompetitive conduct if the political subdivision acts pursuant to state policy to displace competition with regulation or monopoly public service. *City of Lafayette v. Louisiana Power & Light Co., supra, see also Community Builders, Inc. v. City of Phoenix,* 652 F.2d 823 (9th Cir. 1981).

The defendant herein, relying on certain words and phrases in *City of Lafayette,* argues that all it need show in order to avail itself of the state action immunity is that the state "authorized or directed" the activity of which the plaintiffs complain:

> [A] political subdivision [need not] necessarily . . . be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415, 98 S.Ct. at 1138. While finding no fault with the general proposition as cited by the defendant, the Court cannot accept defendant's contention that the language above quoted means that *broad, general organic statutes* are sufficient to insulate a political subdivision of the state from liability for alleged anticompetitive action.

Since its decision in *City of Lafayette,* the United States Supreme Court has, on two occasions, addressed the standard for the application of the state action immunity doctrine, *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), and *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). On each of those occasions the Supreme Court reiterated the proposition that state action immunity may

properly be invoked when the challenged activity is done pursuant to a "clearly articulated and affirmatively expressed state policy" to supplant competition with regulation or monopoly public service, and that policy is "actively supervised" by the state itself. This Court must conclude that, to the extent that *Midcal Aluminum* and *New Motor Vehicle Board* did not simply reiterate *City of Lafayette*'s standard, those cases explicated the standard articulated in *City of Lafayette*. Therefore, the inquiry to be made by this Court is: Does the State of California have a clearly articulated and affirmatively expressed policy to supplant competition in the market for the installation of electrical distribution systems and installation of outdoor lighting systems with regulation or monopoly public service, which policy is actively supervised by the state?

In support of its contention that the State of California does have a clearly articulated and affirmatively expressed policy to supplant competition with monopoly public service, the defendant directs the Court's attention to (1) the regulatory milieu, and (2) the fate of certain bills introduced in the California Legislature.

A

Although the defendant has not cited any California statutes which explicitly address the issue of installation of electrical distribution systems, defendant does cite Cal. Public Utilities Code § 12801, which provides in relevant part:

> A [municipal utility] district *may* acquire, construct, own, operate, control, or use, . . . works or parts of works for supplying the inhabitants of the district, . . . or some of them . . . with light . . . and *may* do all things necessary and convenient to the full exercise of the powers herein granted . . . . (Emphasis added)

This statute does not by its terms create a policy of preferring monopoly to competition; it is merely permissive. As the Supreme Court noted in *City of Lafayette*:

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way,

> the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State. Therefore, in absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city can hardly be found to be pursuant to "the state['s] command," or to be restraints that "the state . . . as sovereign" imposed.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 414, 98 S.Ct. at 1137. It appears from the terms of Cal.Pub.Util. Code § 12801 that each municipal utility district is permitted to make whatever policy decisions it chooses with respect to the construction of electrical distribution systems. As such, the state does not enjoy a sufficient degree of involvement in that decision-making process to insulate the district from the consequences of making an anti-competitive choice.

In addition to Cal.Pub.Util. Code § 12801, the defendant cites a host of other statutes for the proposition that the State of California has a clearly articulated and affirmatively expressed policy to replace competition with monopoly in the generation of electrical energy. Once again, while the Court finds no fault with defendant's general proposition, the Court is not persuaded that the state has a clearly articulated and affirmatively expressed policy to replace competition in "private property wiring" with monopoly. In this regard, it has already been determined that pervasive regulation of a utility generally is insufficient to insulate the utility from liability for any and all anti-competitive conduct:

> There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers *and also to comply with the anti-trust standards to the extent that it engages in business activity in competitive areas of the economy*. (Emphasis added)

Cantor v. Detroit Edison Co., 428 U.S. 579, 596, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976). Therefore, the mere fact of pervasive regulation generally cannot demonstrate the requisite degree of state involvement in a particular course of conduct. The

state policy of preferring monopoly to competition must apply to the very conduct of which the plaintiffs complain.

In conclusion, it cannot be said that any state policy in favor of monopoly in the installation of electrical distribution systems can be gleaned from those statutes that govern and control the defendant in the conduct of its affairs.

B

The defendant's second source for a state policy to replace competition with monopoly is the action or rather the inaction of the State Legislature over the past fifteen years. While it is true that no law explicitly providing for monopoly in the installation of electrical distribution systems has ever been enacted, it is equally true that the Legislature has never enacted any of the many bills introduced that would have required various political subdivisions of the state to increase the business they let to private electrical contracting companies. From these facts, the defendant argues that because the Legislature has had an opportunity to change the *status quo* and has never taken advantage of that opportunity, the *status quo* must be consistent with state policy.

In proffering this argument, the defendant overlooks the requirement that the state policy in favor of monopoly must be "clearly articulated and affirmatively expressed." While considerations of federalism may dictate that the Sherman Act be interpreted to permit the states to make decisions preferring monopoly to competition, *see, e.g., New Motor Vehicle Board v. Orrin W. Fox Co., supra,* the Sherman Act protects interests so vital to the republic, *United States v. Topco Assoc., Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), that such a decision on the part of a state will be honored only when the state clearly and affirmatively announces same. A state policy preferring monopoly to competition cannot be demonstrated by inference. As my learned brother, Judge Solomon, observed in *Hahn v. Oregon Physicians' Service,* 508 F.Supp. 970, 976 (D.Ore. 1981):

> Immunity from the antitrust laws is available when the anticompetitive activity is "clearly articulated and affirma-

> tively expressed as a state policy," and when that policy is actively supervised by the state itself.
>
> Defendants contend that a "clearly articulated state policy" supporting their treatment of podiatrists exists because the Oregon Legislature has refused to pass equality legislation for podiatrists, but has passed such legislation for others in the health care fields.
>
> The failure to enact proposed equality legislation is not alone enough to demonstrate a clear state policy favoring the inequality. As the Oregon Supreme Court stated . . . "Legislative inaction is a weak reed upon which to lean in determining legislative intent."
>
> To be entitled to state action immunity, the state's anticompetitive policy must be affirmative, not passive or inferential. Defendants have not demonstrated a clearly articulated state policy supporting their treatment of podiatrists.

Similarly, the defendant's argument here must fail. The death of a bill, even numerous bills, in committee cannot demonstrate a clearly articulated and affirmatively expressed state policy replacing competition with monopoly public service.

Accordingly, this Court must conclude that the State of California has no clearly articulated and affirmatively expressed state policy favoring monopoly in the installation of electrical distribution systems. Additionally, the Court concludes that the State of California does not actively supervise such a policy. Although the defendant argues that such active supervision is provided by its own Board of Directors, the defendant's Board of Directors is not a state agency, but a political subdivision of the state. Therefore, supervision of the defendant by its own Board of Directors cannot constitute supervision by the state.

As an alternative argument, defendant contends that the California Legislature itself actively supervises the defendant, and thus actively supervises this allegedly anti-competitive conduct. The defendant's argument may be summarized as follows: The Legislature has reserved to itself the authority to direct the defendant's conduct in every sphere; the Legislature has often

exercised its powers and involved itself in the most minute aspects of the defendant's affairs; therefore, it follows that the Legislature is actively supervising *all* of the defendant's conduct, including the conduct of which the plaintiffs complain.

This argument is wholly unpersuasive. It appears that the Legislature exercises no greater supervision over the defendant than it does over any business entity subject to regulation by the state. The scope of the Legislature's power to legislate with respect to the defendant's affairs is virtually without limit, but the mere existence of that power and the occasional willingness to exercise the power in other matters does not constitute active supervision of the alleged anticompetitive conduct challenged herein.

Accordingly, defendant's Motion for Judgment on the Pleadings in regard to its Fifth Affirmative Defense must be, and hereby is, Denied.

Notwithstanding the above, the Court is of the opinion that the availability of the state action immunity constitutes a controlling question of law as to which there may be some ground for a difference of opinion, and an immediate appeal from the Order Denying the Motion for Judgment on the Pleadings may materially advance the ultimate termination of the litigation, 28 U.S.C. § 1292(b). Therefore, the Court hereby grants the defendant leave to seek the permission of the Circuit Court of Appeals for the Ninth Circuit to take an interlocutory appeal, Federal Rule of Appellate Procedure 5.

As a side note, plaintiffs properly noticed a counter-motion pursuant to Local Rule 113(h), moving the Court to grant summary judgment on their contention that the defendant was not entitled to claim state action immunity for its conduct. In the alternative, the plaintiffs requested the Court to strike the defendant's affirmative defenses pursuant to Federal Rule of Civil Procedure 12(f). The Court is of the opinion that a Motion to Strike pursuant to F.R.Civ.P. 12(f) is entirely appropriate; when the affirmative defense is purely a question of law, an early adjudication of that question of law will expedite the litigation and facilitate the administration of justice, *Simpson v. Alaska*

State Comm'n for Human Rights, 423 F.Supp. 552 (D. Alaska, 1976), *aff'd*, 608 F.2d 1171 (9th Cir. 1979).

The Court is also of the opinion that the application of the state action immunity doctrine to the activities of the defendant presents a pure question of law. While it is true that the proper resolution of that pure question of law requires reference to secondary materials, those secondary materials consist entirely of legislative facts and facts of which the Court can take judicial notice. Accordingly, there is no legal reason why a grant of the Plaintiffs' Motion to Strike the Fifth Affirmative Defense is not proper at the present time.

It is apparent to the Court, however, that the defendant did not either notice or appreciate the plaintiffs' counter-motion and thus failed to respond to that motion. At oral argument and subsequently, the defendant repeatedly asserted that, given an opportunity, it could prove certain adjudicative facts that would demonstrate its entitlement to state action immunity. Because the Court's first interest is in having disputes resolved on their merits, and because no significant prejudice to the plaintiffs would result from a brief delay, the Court will, and hereby does, withdraw its previous ruling from the bench granting the Plaintiffs' Motion to Strike. The Plaintiffs' Motion for Summary Judgment or, in the alternative, to Strike the Fifth Affirmative Defense will be continued to March 1, 1982, at 9:00 a. m.

II

The Defendant's Motion for Judgment on the Pleadings embraced not only its Fifth Affirmative Defense, but also its Eighth Affirmative Defense. By its Eighth Affirmative Defense, the defendant contends that regardless of whatever culpability may ultimately be shown, it ought not be required to pay to the plaintiffs any money damages whatsoever. In this regard, the defendant points out that it is a publicly-owned entity; that it is not in business to make money, but purely and simply to provide a public service; that any and all damages assessed against it must necessarily be borne by the rate-payers, the public.

With respect to the defendant's contention that it ought not be required to pay actual damages, such a contention must be rejected. Entities whose revenues are derived from the public fisc are often required to respond in damages, *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The day is long past when it was thought that mere status as a public entity was a sufficient basis upon which to require a tort victim to bear his own damages, *see Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961).

With respect to the defendant's contention that it ought not to be required to pay treble damages, such a contention must likewise be rejected as beyond the powers of this Court. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor .... without respect to the amount in controversy, and *shall* recover threefold the damages by him sustained. ... (Emphasis added)

The defendant's request to limit the plaintiffs to injunctive relief amounts to nothing less than a request to amend Section 4 of the Clayton Act. In essence, the defendant invites the Court to read "shall" as "may." This invitation the Court must decline.

The defendant's argument in this regard is not based on the legislative history of the Clayton Act nor on any plausible reading on Section 4. Rather, the defendant's argument is based entirely on public policy. While the defendant's public policy arguments have some merit, such arguments should be addressed to Congress and not to this Court. The Court is bound by the mandatory language of Section 4, and by the fact that Section 4 is framed in terms of the injured party rather than in terms of the injuring party.

The Court is fully aware of the recent decision in *City of Newport v. Fact Concerts, Inc.*, ____ U.S. ____, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Although the discussion in *City of Newport* clearly has relevance to the contention urged by the

defendant herein, it is not controlling. In *City of Newport,* the United States Supreme Court noted that Congress, in enacting 42 U.S.C. § 1983, intended to codify certain aspects of the common law as it then existed. A thorough and scholarly review of the common law established beyond peradventure that punitive damages were not recoverable from a municipality at common law. Accordingly, 42 U.S.C. § 1983 could not be read as authorizing punitive damages against a municipality.

No such room for maneuver exists with respect to the Calyton Act. Section 4 explicitly mandated the award of treble damages without respect to the status or identity of the wrongdoer. This Court is without the power to rewrite Section 4 of the Clayton Act.

Accordingly, Defendant's Motion for Judgment on the Pleadings in regard to its Eighth Affirmative Defense must likewise be Denied.

As noted above, the plaintiffs filed counter-motions with respect to each of the issues raised by the Defendant's Motion for Judgment on the Pleadings. The plaintiffs again take the position that the Defendant's Eighth Affirmative Defense presents a pure question of law, and as a pure question of law the Eighth Affirmative Defense is without merit and should be stricken. The Court agrees with the plaintiffs, and understands that the defendant does not dispute the assertion that its Eighth Affirmative Defense presents a pure question of law.

Because the Eighth Affirmative Defense raises a pure question of law, and because as a matter of law the Eighth Affirmative Defense is without merit, the Plaintiff's Motion to Strike the Eighth Affirmative Defense is Granted.

IT IS SO ORDERED.

Appendix E

Grason Electric Company, et al., Plaintiffs,

v.

Sacramento Municipal Utility District, Defendants.

Civ. No. S-79-861 LKK.

United States District Court, E.D. California.

Sept. 23, 1983.

MEMORANDUM AND ORDER

KARLTON, Chief Judge.

Long in gestation, a new theory of liability under the federal antitrust laws was delivered by the Second Circuit Court of Appeals in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). For want of a better term, this theory may be described as "monopoly leveraging." It purportedly derives from the more traditional and better defined offense of monopolization, which is proscribed by Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. The essence of the new theory is that "a firm violates § 2 by using its monopoly power in one market to gain an unwarranted competitive advantage in another." *M.A.P. Oil Co., Inc. v. Texaco, Inc.*, 691 F.2d 1303, 1305-06 (9th Cir.1982).

The plaintiffs in the case at bar are thirteen electrical contractors who do business in and around Sacramento, California; they are suing the publicly owned utility that provides electricity to much of the greater Sacramento area. This opinion considers only the plaintiffs' motion for summary judgment specifically on a "monopoly leveraging" theory.[1] They claim that the defendant

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[1] The plaintiffs have alleged a number of violations under sections 1 and 2 of the Sherman Act. In bringing this motion, however, the plaintiffs have elected to proceed solely on their monopoly leveraging claim, which they refer to as a cause of action for monopolization under section 2. Thus the court does not now consider or express any opinion on the plaintiffs' claims under section 1 of the Sherman Act, nor their

has unlawfully used its alleged monopoly power in the retail electrical energy market to preclude the plaintiffs from obtaining work constructing what they call "electrical distribution systems," and to compete unfairly for work installing and maintaining street lighting and outdoor (security) lighting systems.

It would take very little to establish that the plaintiffs have not, for summary judgment purposes, made out the necessary elements of their monopoly leveraging claims. Nonetheless, it appears worthwhile to explore these claims at some length in order to attempt to narrow the focus of the legal and factual inquiry which they present. As I shall explain, the appellate courts have made that task fairly complicated by announcing what amounts to a new antitrust offense without exploring the practical ramifications of that expansive move.

I

THE SUMMARY JUDGMENT STANDARD

There are repeated suggestions in the cases that the summary judgment device is somehow different when it is invoked in the context of an antitrust action. Thus it has been noted that

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attempted monopolization claim under section 2. Nor has the court yet been presented with the plaintiffs' more usual section 2 monopolization claim, *i.e.*, the allegation that defendant has "monopolized" the "markets" for "electrical distribution systems" and "street and outdoor lighting systems." Finally, the court has elected to bifurcate its consideration of the plaintiffs' motion itself. The court has reserved consideration of the plaintiffs' request for summary judgment on defendant's affirmative defenses until it determines whether the plaintiffs are entitled to summary adjudication regarding the "prima facie" elements of their monopoly leveraging theory. In summary, this memorandum is concerned only with whether the plaintiffs would be entitled to judgment on the theory set forth in *Berkey Photo*, assuming arguendo that the defenses cannot stand. Finally, while it is of course part of any prima facie case to demonstrate that the court has jurisdiction over the subject matter of the action, the question of whether the jurisdictional prerequisites of the Sherman Act are met in this case is raised by defendant's third and fourth defenses. Thus consideration of that question will be deferred pending further argument.

summary judgment is disfavored in antitrust cases in which motive and intent are important factors . . ." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 at 901 (9th Cir. July 12, 1983), *citing Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). Nonetheless, "its use is not prohibited and may save judicial resources." *Aydin, supra, citing First National Bank v. Cities Service Co.*, 391 U.S. 253, 288-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968). In short, although the court will entertain such a motion, "[t]he moving party is subject to a 'particularly rigorous' burden in antitrust cases." *Aydin, supra* at 902, *quoting Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir.1977); *accord, Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276, 280 (9th Cir.1976), *cert. denied* 431 U.S. 938, 97 S.Ct. 2651, 53 L.Ed.2d 256 (1977).

As with much of the lore of antitrust law, the precise significance of the foregoing is lost on this workaday judge. It is of course important to recognize that questions of intent and motive are not generally susceptible to disposition on summary judgment, whether they arise in the antitrust context or elsewhere. *See Soto v. County of Sacramento*, 563 F.Supp. 520, 541 (E.D.Cal.1983); *see generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 (2d ed. 1983). Moreover, because antitrust actions frequently turn on such inquiries into state of mind, and because they are often quite complex, they are "by their very nature poorly suited to disposition by summary judgment." *Id.* § 2732.1 at 313; *see also* II P. Areeda & D. Turner, *Antitrust Law* § 316b (1978) [hereinafter cited as II Areeda & Turner]. While these observations commend caution in proceeding in this context, they do not seem to establish the existence of a standard for antitrust summary judgment motions that is different in substance from the usual standard applied by courts when they consider motions under Fed.R.Civ.P. 56. II Areeda & Turner, *supra* at 62 ("The suggestion that summary procedures are less appropriate in antitrust cases as such may be put aside, for the Federal Rules make absolutely no distinction between antitrust and other cases." *Id., discussing Poller v. CBS, supra.*) Indeed, the same cases which gravely point out the "particular rigors" facing a party who moves for summary judgment in the antitrust

context go on to delineate the applicable standard in precisely the same terms generally used to adjudicate motions under Rule 56. *See Aydin* at 902; *Mutual Fund Investors,* 553 F.2d at 624-25; *Javelin Corp.,* 546 F.2d at 280. Accordingly, I shall employ that familiar set of tools in disposing of the present motion.

Summary judgment is proper only when the materials submitted by the moving party "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Aydin* at 901-902. It is well settled that the moving party has the burden of establishing that this standard is satisfied. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159-60, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970); *Program Engineering, Inc. v. Triangle Publications,* 634 F.2d 1188, 1192-93 (9th Cir.1980). However, if the moving party is successful in making out a prima facie case, that would entitle that party to a directed verdict if uncontradicted at trial, summary judgment will be granted unless the opposing party "present[s] specific facts demonstrating that there is a [triable] factual dispute about a material issue." *Program Engineering, Inc.* at 1193; *see Aydin* at 902. Throughout this process, "all evidence and inferences therefrom are to be construed in the light most favorable to the party opposing the motion." *Mutual Fund Investors,* 553 F.2d at 624, citing *United States v. Diebold,* 369 U.S. 654, 655, 82 S.Ct. 933, 994, 8 L.Ed.2d 176 (1962). "Nevertheless, the opponents' version of the facts must support a viable legal theory which would entitle them, if accepted, to a judgment as a matter of law." *Mutual Fund Investors,* 553 F.2d at 624.

Given the manner in which this motion was couched (*see* n.2, *infra*), another observation regarding the summary judgment process is particularly in order. As this court has noted elsewhere, "in all summary judgment motions, the court's task is the discovery of material disputes of fact, not their resolution." *Kouba v. Allstate Ins. Co.,* 523 F.Supp. 148, 154 (E.D.Cal.1981), *rev'd on other grounds,* 691 F.2d 873 (9th Cir.1982); *see also* 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 200[06] (1982) (hereinafter Weinstein & Berger) ("The [summary judgment] device is not intended to resolve issues which are within the traditional province of the trier of fact, but rather to see whether

there are such issues." Weinstein & Berger, at 200-31, *quoting* James, *Civil Procedure* ¶ 6.18 (1965)). With these principles in mind, I turn first to an examination of the factual assertions underlying this motion.

II
FACTUAL BACKGROUND[2]

The defendant Sacramento Municipal Utilities District (SMUD) is a public entity created pursuant to state law.[3] Its

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[2] The plaintiffs have styled their motion as one for summary judgment, "or in the alternative for partial summary judgment and for an order specifying facts without substantial controversy . . . ." Obviously, it would aid the prompt and expeditious disposition of this case if the court could oblige the plaintiffs by reciting a detailed and comprehensive list of material facts that are no longer genuinely in dispute. Unfortunately, none of the parties has dealt with this motion in a manner that would facilitate the court's efforts in this regard. The plaintiffs are attempting to try a very complex case, using a new theory, on a summary basis. The inherent difficulties in doing this are greatly compounded by the highly colored, consistently tendentious manner in which the plaintiffs present what they would have the court accept as undisputed facts and established principles of law. For its part, the defendant refuses, almost without exception, to concede even the most obvious points. In short, the plaintiffs will not admit that any issue is genuinely in dispute, and the defendant will not allow that any is undisputed. The biggest problem caused by the plaintiffs' overzealousness and the defendant's obdurate stance is that both sides have buried themselves so deeply in the battle that they have done very little to ascertain for themselves or the court what the contours of the legal dispute really are, and hence which facts are *relevant*. Without more definition, the court is reluctant to enter the fray regarding such matters as whether the defendant may purchase electricity wholesale from the Bonneville Power Administration, or how many electric power poles the defendant installs in a year. Thus the sort of catalog sought by the plaintiffs is clearly out of the question. The court will, however, attempt to narrow the issues of fact; to that end, the facts stated by the court throughout this memorandum should be regarded as established unless the specific matters discussed are identified as mere allegations, or otherwise in dispute.

[3] The complicated nature of SMUD's status as a public body, and the somewhat obscure statutory framework from which it arose are discussed in some detail by my brother Ramirez in his earlier decision in this case. *Grason Elec. Co. v. Sacramento Municipal Utility District*, 526 F.Supp. 276 (E.D.Cal.1981) (denying SMUD's motion for judgment

primary business is the retail sale of electrical energy. At the time that the complaint was filed in this action, SMUD's service area covered some 757 square miles including and adjacent to the City of Sacramento. Like most electric utility companies, SMUD is virtually the exclusive supplier of retail electricity within its service area.[4] Unlike many other utilities, however, SMUD (through its Board of Directors) makes its own rules and sets its own rates and charges. *See* Cal.Pub.Util.Code §11885. Thus it can fairly be said that SMUD has absolute control over the price paid for electrical energy in its service area.

The plaintiffs allege—and SMUD indignantly denies—that SMUD engages in business activities other than simply the retail sale and distribution of electricity. Specifically, the plaintiffs allege that SMUD constructs and maintains what the plaintiffs term "electrical distribution systems" in the SMUD service area. The plaintiffs also claim that SMUD is unfairly competing with them for work constructing what they call "street and outdoor lighting systems." SMUD's activities in these areas form the basis

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on the pleadings; that motion was based on the theory that SMUD is immune from antitrust liability under the "state action" exemption recognized in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) and its progeny).

[4] The establishment of this simple fact presents a splendid example of the phenomenon discussed in n.2, *supra*. The plaintiffs attempt to support their assertion in this regard by citation to the pleadings; the defendant, in its opposition, notes that it denied in its answer that it was the exclusive supplier of retail electricity in its service area; the plaintiffs respond to that observation by dubbing the fact "uncontroverted by SMUD." Thus the plaintiffs simply choose to ignore their own failure of proof, and the defendant, with absolutely no attempt at clarification, just leaves hanging a simple but fundamental factual issue rather than make the plaintiffs' (and the court's) task one whit easier. In an answer to one of the plaintiffs' interrogatories, however, the defendant explains its denial by pointing out that owners of certain mobile home parks have been permitted by SMUD to "submeter" electricity in order to adjust rental charges for energy consumption. Plaintiffs' Exhibit 20, Defendant's Answer to Plaintiffs' First Set of Interrogatories, Interrogatory No. 5. It appears that such limited resale of electricity is of little or no consequence to the facts relevant to this case.

of this action; thus in order to explain what the parties are arguing about it is necessary to describe what is meant by "electrical distribution systems," "street lighting systems" and "outdoor lighting systems," and to attempt to tie those descriptions to undisputed facts regarding events in the real world.

The retail sale of electricity necessarily contemplates the distribution of that energy to the consumer. It is obvious that, up to a point, the installation and maintenance of facilities and equipment necessary to the delivery of retail electricity to SMUD's customers are merely part of SMUD's lawful activities as a provider of electrical energy. The assumption underlying this litigation is that, at some point, the delivery of SMUD's product turns into a different product (or service) in itself. In other words, the plaintiffs assert that there is some point, between the construction of high-voltage electric transformers and the act of screwing in a light bulb or plugging in a toaster, where SMUD's delivery of its product ends and a different activity commences. Whether such a point exists, and if so where precisely that point is to be fixed are the essential questions underlying the dispute regarding "electrical distribution systems."

According to the plaintiffs, the critical point at which SMUD's lawful delivery of its product is transformed into an unlawful encroachment on free enterprise is fixed geographically; it is "the outer property line of the property for which new electrical service is required." Thus all of the wiring and other equipment connecting the off-property SMUD feed lines to the on-property structure which requires electric service, taken together, compromise the "electrical distribution system," or EDS.[5]

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[5] The plaintiffs define an electrical distribution system as "all of the permanent or temporary electrical distribution lines and related equipment between the service equipment at the dwelling or other structure and the point of termination of the conductors at the source of feed thereof, at or outside of the property line. The property line means the outer property line of the property for which new electrical service is required. In the case of a development or subdivision in which the interior streets . . . are to be dedicated, the outer property line of the entire development is the property line. [¶]The distribution system ordinarily includes, but is not limited to all service entrance conductors,

SMUD admits that it carries power through its own facilities, across property lines, and often well past the boundaries described by plaintiffs. Indeed it is undisputed that, in the case of private residences, SMUD installs and maintains power lines and equipment right up to the meter box attached to an outside wall of the house itself. SMUD asserts that it has traditionally performed these services in connection with private residences, dating back to the time when most electricity was provided to private homes via low voltage lines run directly from off-premises SMUD poles to connecting points on the exterior of the houses.

SMUD admits, however, that there was a period when it did not run lines all the way to private residential structures. Sometime in the 1960's, overhead connecting lines run from pole to private structure fell into disfavor, and SMUD began running its service lines underground. In the case of private residences, SMUD ended its underground distribution at a "pedestal" located on the owner's property, but some distance from the house itself. During that period SMUD permitted—and indeed required—the owner of the individual residence (in fact, generally the developer of the residential subdivision) to provide his or her own connective wiring between the pedestal and the house. This connective work was presumably performed in large measure by private electrical contractors such as the plaintiffs.

In 1973, however, SMUD, in its words, "resumed its historic practice of serving to the residential customer's meter." Memorandum in Opposition at 231 (filed Feb. 1, 1982). In other words,

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service laterals, service conductors, clusters, pedestals, or other junction connectors, secondary conductors, transformers, primary conductors, conduit, ducts, vaults, manholes, pullboxes or other subsurface structures, transformer pads, trenching, backfill and compaction." Plaintiffs' Memorandum filed September 14, 1981 at 24-25. Purely for the sake of convenience, I shall refer to the complex of wiring, connections and other hardware described by the plaintiffs as the "EDS." In doing so, I do not mean to suggest that I am persuaded that the thing described by the plaintiffs is in any real sense separable from the entire electrical distribution network maintained by SMUD. By doing so I certainly do not imply that there is in reality a separate market or submarket for electrical distribution systems.

SMUD's rules require that only SMUD may install the electrical distribution equipment from the property line to the house meter box. The customer (again, usually the developer) is required to pay SMUD a fee for the work. According to the plaintiffs, the fee charged is less than what it would cost for them to do the work for the customer.[6] In any event, there is far less work than there was prior to 1973 for electrical contractors installing "electrical distribution systems" in the SMUD service area.

Much of what the parties argue about is centered on the provision of service to single-family dwellings, as describe above. The parties apparently focus their arguments on this phenomenon because it provides a useful paradigm for the larger discussion regarding SMUD's distribution services, and perhaps because the construction of EDS's for private residences is the single greatest concern of the plaintiffs. In any event, it must be noted that the plaintiffs are not *merely* concerned with SMUD's distribution of energy (past property lines) to individual houses. Rather, they contest SMUD's activities in bringing power across the property lines of various customers, including multi-family residences, commercial developments (such as shopping centers), and industrial developments. All of these activities, the plaintiffs claim, constitute unlawful encroachment on what would otherwise be free competition for the construction of necessary distribution facilities. SMUD responds that all of its operations within and without customers' property lines are consistent with SMUD's mandate. That mandate, SMUD says, is to bring electrical energy in a form that can be used by the given customer and to a place where it is useful to the customer.[7]

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[6] In 1978, the price charged by SMUD for providing an underground "EDS" was $250.00 per "residential service run" (to use SMUD's terminology). *See* SMUD Rule and Regulation 15 (July 6, 1978), included in Exh. 78 to the plaintiffs' memorandum in support of their motion for summary judgment.

[7] In this regard, SMUD points out that for large industrial consumers, it provides electricity at a high voltage to the customer's property and permits the industrial customer to construct and maintain facilities to "step down" the power to a voltage that meets the customer's specific needs. Similarly, in the case of an apartment house or a shopping center,

In addition to their allegations regarding electrical distribution systems, the plaintiffs complain of SMUD's activities in the construction and maintenance of "street and outdoor lighting systems." Although the plaintiffs lump them together in this fashion, it appears that the terms "street lighting systems" and "outdoor lighting systems" describe two somewhat different things which, for analytical purposes, should be described separately.

Street lighting systems are generally defined in SMUD's Rates 51, 52 and 53 (1978) as outdoor lighting services supplied by customer-owned or SMUD-owned facilities for streets, highways, bridges, public parks and various kinds of schools. Under Rate 51, the customer builds and maintains the system, and pays SMUD a set rate based on the wattage used per month. Under Rate 52, the customer installs and continues to own the system, but SMUD does the necessary maintenance work on the street lamps and other equipment. Finally, under Rate 53, SMUD constructs, operates and maintains the street lighting system, and retains ownership of it. Both Rate 52 and 53 provide that the customer shall pay SMUD a fixed, monthly charge per lamp, based on the type and wattage of lamp used.

The plaintiffs' allegations with regard to street lighting systems differ from the claims regarding electrical distribution systems in that the plaintiffs do not allege that SMUD has entirely precluded electrical contractors from competing for the desired work by adopting a restrictive regulation.[8] Rather, the plaintiffs point to the fact that developers, public entities, etc., which desire such systems can have them installed by SMUD under Rate 53 at no

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SMUD does not run the power to each individual unit, but rather provides service as far as an on-property transformer; the owner of the property may (and indeed must) connect the various structures or units to the transformer. The significance of SMUD's policies will be discussed further below.

[8] The defendant has tendered to the court evidence showing that almost 80% of the street lighting which has been installed in its service area since 1975 has been under Rate 51, *i.e.*, constructed and maintained by the customer through private electrical contractors or otherwise.

initial charge—instead, the costs of installation and maintenance are absorbed into SMUD's rate structure and thus are recovered via monthly charges to all customers participating in the Rate 53 program. Moreover, developers and other such customers who contact SMUD regarding the provision of electricity for street lighting are informed of SMUD's "package deal" under Rate 53. As will be discussed more fully below, these facts are at the core of the plaintiffs' charge that SMUD engages in anti-competitive practices in the construction and maintenance of street lighting systems.

What the plaintiffs refer to as "outdoor lighting systems" involve a somewhat different set of facts than those discussed in relation to "street lighting systems;" indeed, they are perhaps more accurately described by the plaintiffs in their briefs as a "security light service" provided by SMUD. Pursuant to its Rates 71 through 78 (1978), SMUD places outdoor lights on its (pre-existing) utility poles for residential and commercial customers who wish to have specific areas illuminated for security purposes or other unspecified reasons. Again, SMUD makes no initial charge for installation, and bills the customer a flat monthly rate based on the type and wattage of lamp used. It is undisputed that SMUD refuses to allow the plaintiffs, or indeed anyone other than a SMUD employee, to place lamps on its utility poles.

The plaintiffs allege that they are in competition with SMUD in that each of them is "ready, willing and able" to construct electrical distribution systems and street lighting systems, and to provide "security light services." The plaintiffs are all licensed electrical contractors, doing business in the SMUD service area, and are capable of doing most or all of the work entailed in constructing those various systems, according to their undisputed declarations.

The common thread running through the plaintiffs' allegations concerning electrical distribution systems, street lighting systems, and "outdoor" or "security light services," is the contention that SMUD has used its alleged monopoly power in the market for the retail sale and distribution of electric energy to thwart competition in other areas. Before examining the merits of the plaintiffs' claims regarding each of the activities described above, it appears

appropriate to discuss the nature and development of the unifying theory upon which the plaintiffs seek to rely.

III

THE GENESIS AND CONTOURS OF "MONOPOLY LEVERAGING"

In attempting to resolve the issues tendered by the instant motion, I sometimes felt as if I had ventured through the looking glass. Accordingly, I shall follow the advice given Alice and begin at the beginning. In this motion, the plaintiff asserts a "monopolization" claim under Section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2.[9] Unlike Section 1 of the Sherman Act, which broadly prohibits all activities that "unreasonably" restrain interstate or international trade, *see Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), Section 2 fixes more narrowly on a specific economic problem: monopoly power. In the words of a leading commentator:

> Focusing on the private monopolization of trade or commerce, Section 2 seeks to promote market competition by preventing large aggregations of economic power from being built unfairly. Its primary goal is to prevent a firm or group of firms from acquiring or maintaining monopoly power through abusive or inequitable practices.

II E. Kintner, *Federal Antitrust Law* § 11.1 at 301 (1980) (hereinafter II Kintner).

As I shall explain, the claim pressed by plaintiffs in the present motion does not relate in any direct sense to this "primary goal" of Section 2. The monopoly leveraging theory, as articulated in *Berkey Photo* and its progeny does not attack either the acquisi-

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[9] Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty . . . [of an offense under the Act]."

tion or the maintenance of monopoly power in a given market; rather it seeks to curb the abuse of otherwise lawful monopoly power in markets other than the one in which the power is held. While this aim is not inconsistent with the purposes of the Sherman Act, it does present analytical problems which are quite different from those usually encountered in Section 2 monopolization claims.

Monopoly power is classically defined as "the power to control prices or exclude competition" in a relevant market. *United States v. DuPont & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). In order to restrict the development of monopoly power, Congress created three "separate and distinct offenses" under Section 2: monopolization, attempt to monopolize, and combination or conspiracy to monopolize. II Kintner, *supra* at 301. The framers of the Sherman Act recognized, however, that mere possession of monopoly power may be altogether "innocent" and, indeed, may be the result of healthy and beneficial economic activity. *See DuPont*, 351 U.S. at 390-91, 76 S.Ct. at 1004-05; I E. Kintner, *Federal Antitrust Law* § 4.14 (1980) (hereinafter I Kintner). Thus in fleshing out the substantive Section 2 offenses, the courts have required a showing of something more than that the alleged violator possesses monopoly power.

In the context of a monopolization claim—purportedly what is at issue here—the Supreme Court has specified that a monopoly is not unlawful unless the actor "has illegally acquired it, or, on the other hand, . . . unless he has 'maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under section one.' " Levi, *A Two Level Anti-Monopoly Law*, 47 Nw.U.L.Rev. 567, 580-81 (1952), *quoting United States v. Griffith*, 334 U.S. 100, 106, 68 S.Ct. 941, 945, 92 L.Ed. 1236 (1948). The elements of a monopolization claim are therefore generally stated as (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. *E.g., Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982).

In the claim being considered here, however, the plaintiffs do not assert that SMUD holds a monopoly in the "markets" which would normally be considered "relevant" for purposes of analyzing a monopolization claim, *i.e.*, the economic areas in which the plaintiffs seek to compete with SMUD. Nor do they dispute the legitimacy of SMUD's alleged monopoly over the retail sale of electrical energy, for the plaintiffs are not contending, in any ordinary sense, that SMUD acquired or maintained that alleged monopoly unlawfully. In short, the instant motion does not tender a claim of "monopolization of a relevant market," as that offense has traditionally been understood.

It does not follow, however, that the plaintiffs have failed to state a "monopolization" claim under Section 2. As I have noted, the courts have recognized that a firm which has used monopoly power, lawfully acquired in one market, to "gain an unwarranted competitive advantage" in another market, has committed the offense of monopolization even though it has sought neither to maintain nor expand its monopoly in the first (or "monopoly") market, nor to acquire monopoly power in the disputed markets. *M.A.P. Oil Co.*, 691 F.2d at 1305-06; *Berkey Photo,* 603 F.2d at 275. This somewhat anomalous result may be traced, in some measure, to the felt need of the courts to police certain activities of monopolists, although those activities may not otherwise constitute antitrust violations. In the instant case, for example, the plaintiffs' allegations regarding electrical distribution systems resemble various practices which would be proscribed by Section 1 of the Sherman Act[10]—most notably "tying arrangements."[11] In

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[10] Section 1 (15 U.S.C. § 1) provides, in pertinent part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

[11] "A tying arrangement is an agreement by a party to sell one product only on the condition that the buyer also purchase a different or 'tied' product." *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 540 (9th Cir.1983); *see also* L. Sullivan, *Handbook of the Law of Antitrust* 431 (1977). Thus under the allegations in this case, the electrical distribution systems could be viewed as a product or service "tied" by SMUD to the purchase of electrical energy.

that claim, however, the plaintiffs are concerned only with the alleged unilateral conduct of SMUD; they do not establish the *concerted* activity required for a violation of Section 1. *See Berkey Photo,* 603 F.2d at 272; II Kintner, *supra* § 11.5. Similarly, the plaintiffs' claims bear some of the features of an attempted monopolization claim under Section 2. While such a claim is asserted elsewhere in the complaint, the plaintiffs do not presently contend that SMUD acted with the specific intent to monopolize, which is the *sine qua non* of an attempt action. *See Forro Precision, Inc.*, 673 F.2d at 1059.

In sum, federal antitrust law, at least in theory, failed to address certain anticompetitive conduct by monopolists that was undertaken unilaterally and without the purpose of acquiring or maintaining monopoly power either in the monopoly market or the second, disputed market. This theoretical gap led at least one commentator (prior to the *Berkey Photo* decision) to suggest that the courts recognize a new and "unique" Section 2 offense prohibiting abuses of monopoly power. *See* Hawk, *Attempts to Monopolize—Specific Intent As Antitrust's Ghost in the Machine,* Cornell L.Rev. 1121, 1156-59 (1973).

The court's, however, rather than treating the problem as unaddressed by the statutes seemed to suggest that the need was already filled by existing antitrust law. The most important example is probably the Supreme Court's statement that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith,* 334 U.S. at 107, 68 S.Ct. at 945; *see also, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973), *reh'g denied,* 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 201 (1973); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 n. 2 (7th Cir.1977), *cert. denied,* 439 U.S. 822, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978).

Despite the ringing words of the *Griffith* opinion, the precise significance of that case is shrouded in mystery. The facts of *Griffith* have been described, and the opinion dissected, in great detail by the commentators. *See, e.g.,* II Kintner, *supra* § 12.15. As Kintner fairly points out, "[t]he Supreme Court's opinion in

United States v. Griffith is subject to at least four differing interpretations." *Id.* 410 U.S. at 389, 93 S.Ct. at 1035. Among those interpretations is that the Court was condemning "the mere use of monopoly power to obtain competitive advantages in another market as a *separate offense* under section 2 of the Sherman Act." *Id.*[12] A better reading of *Griffith,* however, is probably that it concerned an attempt by a party with monopoly power in one market to monopolize a second market; under this analysis the significance of the monopolists' "abuse" of its power was that it proved the specific intent to monopolize which is an essential element of an attempt claim. In any event, the latter explanation of *Griffith* was apparently the one adopted by the author of that opinion, Justice Douglas, in a subsequent opinion written for the Court. *See Otter Tail Power Co.,* 410 U.S. at 377, 93 S.Ct. at 1029; *see also* Hawk, *supra* at 1128.

In summary, prior to the *Berkey Photo* decision, there was discussion both in case and commentary regarding the abuse of monopoly power, but it was unclear what the significance of such abuse was in the context of Section 2 of the Sherman Act. *See* Levi, *supra* at 571; Hawk, *supra* at 1156-57. As I have noted, *Otter Tail* apparently stands for the proposition that such abuses supply the necessary "specific intent" element where the charge is an unlawful attempt to monopolize a second market. Other cases have held that the abuse of monopoly power in a second market *to maintain or preserve that power* in the first, or monopoly market, established the "willful maintenance" element of a claim that the

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[12] This interpretation is closest to the one advanced by the plaintiffs in support of this motion; the important difference, of course, is that the plaintiffs view their theory as a form of monopolization claim rather than some separate form of Section 2 offense. In addition to this interpretation and the alternative explanation of *Griffith* as an attempt case (*see* discussion in text, *infra*), Kintner posits two other interpretations of the Court's opinion. First, he suggests that the Court was saying that the abuse of monopoly power to expand *that* monopoly constitutes the offense of monopolization under Section 2. Second, he raises the possibility that what the Court meant was that the abuse of monopoly power evidenced a *conspiracy* to monopolize a second market. II Kintner, *supra* §12.15 at 389.

defendant had committed the offense of monopolization with regard to the first market. *E.g., Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 503 (9th Cir.1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). Still other cases establish that when a monopolist actually attains monopoly power in the second market through abuse of a monopoly in the first market, that abuse is sufficient to show that the second monopoly was acquired "willfully." *E.g., Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1385-86 (5th Cir.), *reh. denied*, 618 F.2d 1389 (5th Cir.), *cert. denied sub nom, Woodlands Telecommunications Corp. v. Southwestern Bell Tel. Co.*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980). None of these cases really aid the plaintiffs in the context of this motion, however, for the plaintiffs do not presently contend that SMUD is attempting to monopolize any of the disputed areas of competition within the meaning of Section 2; nor do they assert (for purposes of this motion) that SMUD has attained a monopoly in any of those "markets," nor that SMUD's activities vis-a-vis electrical distribution systems, street lighting, or outdoor lighting systems in any sense "preserved" SMUD's alleged monopoly of the retail sale of power.

In sum, the theory relied upon by the plaintiffs in this motion was not clearly articulated until Judge Kaufman announced the Second Circuit's opinion in *Berkey Photo*, 603 F.2d 263.[13] That lawsuit was brought by Berkey Photo, Inc. ("Berkey"), a "prominent participant" in the amateur photographic industry against the Eastman Kodak Company ("Kodak"), "the preeminent firm" in that industry. *Id.* at 267. At trial, Berkey established that

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[13] The "monopoly leveraging" theory set forth in *Berkey Photo* apparently had been employed, although not really explained, in a few earlier cases. *See* P. Areeda, *Antitrust Law* ¶ 729.4c (1982 Supplement). The most significant earlier case was probably *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711-12 (7th Cir.1977), *cert. denied*, 439 U.S. 822, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978). The court in that case seemed to view proof of "monopoly leveraging" as a means of inferring the intent (*i.e.*, "willfulness") necessary to establish monopolization of the first market. *Id.* at 711-12. The significance of this theoretical approach is discussed in the text, *infra*.

Kodak held monopoly power in the markets for amateur conventional still cameras, film (other than "instant" film) used by amateur photographers, and "color paper—that is, paper specially treated so that images from color film may be printed on it. . . ." *Id.* at 267-73. The jury found, moreover, that Kodak used this power to gain an advantage in markets for photofinishing services and equipment, in which Kodak held no monopoly. On the basis of this conduct and resultant injury to the plaintiff, the jury awarded very substantial damages to Berkey.

For our purposes, the vital question among those raised on appeal in *Berkey Photo* was "whether a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." 603 F.2d at 275. The Second Circuit held, "as did the lower court, that it does." *Id.* In an elegantly written opinion, Judge Kaufman traced the development of anti-monopoly jurisprudence under Section 2 of the Sherman Act, beginning with the passage of the statute and the consequent creation by Congress of " 'a new jurisdiction [in the federal courts] to apply a "common law" against monopolizing.' "[14] *Id.* at 272, *quoting* 3 P. Areeda & D. Turner, *Antitrust Law* 40 (1978). After defining monopoly power in conventional antitrust terms, and explaining why such power is "inherently evil," *Id.* at 272-73, Judge Kauf-

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[14] While it is clear from the statutory history that Congress desired the courts to develop a federal "common law" in this area, that phrase has several meanings, and it is by no means clear which of those meanings applies to the antitrust field. Simply put, it is one thing to conclude that Congress meant to create three substantive offenses under Section 2 of the Sherman Act (monopolization, attempted monopolization, and conspiracy to monopolize), but left it to the courts to fill in the necessary definitions of the elements of those offenses (*e.g.*, the definition of "monopoly," or of "attempt"). It is something quite different to suggest that Congress intended to give the courts *carte blanche* to create new causes of action consonant with the underlying policy of the Act, and merely specified the three Section 2 offenses in order to give the courts some idea as to what it had in mind when it enacted the legislation. It is in this light that the question of whether "monopoly leveraging" is a "new" Section 2 offense—as opposed to being some variant on one of the original three offenses—may be of greatest significance.

man went on to explain that, nonetheless, "§ 2 does not prohibit monopoly *simpliciter*—or, as the Supreme Court phrased it in the early landmark case of *Standard Oil Co. of New Jersey* . . . , 'monopoly in the concrete.' " *Id.* at 273, *quoting* 221 U.S. 1, 62, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911). Rather, he noted that monopoly power is not unlawful unless it is acquired or maintained "willfully"—with the intent to engage in anti-competitive conduct. *Id.* at 273-75.

As the fulcrum upon which this Section 2 see-saw is balanced, Judge Kaufman identified the following rule: "[A] monoplist is tolerated but not cherished. Thus . . . the mere existence of monopoly power 'whether lawfully or unlawfully acquired,' is in itself violative of § 2, 'provided it is coupled with the purpose or intent to exercise that power.' " *Berkey Photo,* 603 F.2d at 274, *quoting Griffith,* 334 U.S. at 107, 68 S.Ct. at 945. To the extent, therefore, that a monopolist, which has acquired its power lawfully, uses the advantgaes that derive from its size and integration to compete in its own market or elsewhere it does not offend the Sherman Act. *Berkey Photo,* 603 F.2d at 274. That "lawful" monopolist, however, violates the law when it uses its power "to beget monopoly." *Id.* at 275, *quoting Griffith,* 334 U.S. at 108, 68 S.Ct. at 946. More importantly, by striking the balance in the place that he did, Judge Kaufman was led to the "inexorable interpretation of the antitrust laws" that the use of monopoly power to gain competitive advantage offends Section 2, regardless of whether that use of power is in any sense directed towards the acquisition or preservation of monopoly. *Id.* at 275.

The *Berkey Photo* opinion, by virtue of its adoption in *Mapp,* seems to have settled the question in this circuit of whether a "pure" monopoly leveraging theory exists; moreover, the opinion provides some description of the doctrinal basis of that theory. In a sense, however, the opinion raised more questions than it answered.

First of all, *Berkey Photo* did not directly address the issue of whether "monopoly leveraging" merely provides a necessary element for a finding of liability under one of the three specified Section 2 offenses, or whether that doctrine describes a new and separate substantive offense under the Act. Although the opinion

describes the offense of monopolization (and the monopolization cases) at some length, it appears that the purpose of that discussion is only to uncover the policies underlying Section 2, and to trace the manner in which those policies have been effectuated by the courts. The court evinces from its discussion a general rule regarding the legal limitations on monopoly power, and announces that that rule is violated any time monopoly power is used to gain a competitive advantage. This analytical process clearly speaks to the purpose of the statute itself rather than the limits and possibilities of any pre-existing statutory offense, and thus seems to be describing a new and different way of proceeding under the Act—that is, a new Section 2 offense. To the extent that there is any question about the courts' power to create such an offense (*see* n. 14, *supra*), the Second Circuits's analysis simply does not address the question.[15]

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[15] The power of the courts through the "federal common law," to create an entirely new cause of action not in terms authorized by statute, where Congress has provided specific remedies, is like many of the problems of "federal common law," "a very complicated question, which yields to no simple answer. . . ." Wright *The law of Federal Courts* 4th Ed. 388. While clearly this issue is not exactly the same as a question of an implied right of recovery for the breach of a federal statute by someone injured by the breach, *see Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), nor a question of whether a statute supplants pre-existing "federal common law," *see City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), nor a question of filling a legislative "interstitial" gap of the kind created when Congress does not supply a statute of limitations, *see DelCostello v. Teamsters*, ____ U.S. ____, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), many of the same considerations which inform such decisions would appear to apply. By observing that this issue is different from more traditional "federal common law" questions, I do not mean to suggest that the federal courts are foreclosed from such activity. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (holding money damages available to union members for a violation of the duty of fair representation) or *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (providing a common law remedy of money damages for violation of the Fourth Amendment). Nonetheless, as Justice Harlan

The Ninth Circuit may, however, be read as having the view that *Berkey Photo* merely describes a species of monopolization claim under Section 2. *See M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d at 1305-06. This explanation, while avoiding the questions raised in nn. 14 & 15, itself raises further problems. First, of course, is the urgent matter of what the defendant is charged with doing. That question becomes more difficult the more one considers the question, for *Berkey*, like *Griffith* before it, is subject to multiple interpretations. Keeping in mind, however, that *Berkey* apparently does not require actual monopolization or attempted monopolization of the contested market, the only readily apparent answer is that the defendant's conduct in the "second" market raises an inference sufficient to support the conclusion that the firm is "willfully" maintaining its monopoly power in the "first" (or "monopoly") market. If this reading is correct in the instant case, we are to understand that if SMUD is indeed using its power as a lever outside of the market for retail electrical energy, that fact "proves" that SMUD is "willfully maintaining" its power *within* that market; SMUD's conduct vis-a-vis, *e.g.*, electrical distribution systems is relevant, under this analysis, only insofar as it evidences SMUD's intent to control retail electricity sales. Given that no one has suggested that SMUD has acted "'willfully" to acquire or maintain the monopoly granted it by both state law and "natural" economic conditions, this analysis is an elaborate fiction at best. Certainly it is a departure from "[t]he basic formula for illegal monopolization [*i.e.*] 'exclusionary' behavior that achieves, maintains, or increases monopoly power *in a given market.*" P. Areeda, *Antitrust Law* ¶ 729.4 at 178 (1982 Supplement) (emphasis added).

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demonstrated in his concurring opinion in *Bivens*, such questions are agonizingly difficult. Again, I do not suggest that *Berkey* was wrongly decided, I merely note that *Berkey* does not address the issue. It may be that the Court in *M.A.P. Oil Co. v. Texaco, Inc.*, 691 F.2d 1303 (9th Cir. 1982), perceiving this problem's difficulty, sought to avoid it by construing *Berkey* as a conventional section 2 cause of action without specifying which form of section 2 violation was at stake. If so, as I describe in the text, the circuit avoided one set of theoretical problems only to engender a second set.

This theoretical gap leads back to the second, more practical, set of problems that arise in the wake of the *Berkey Photo* decision: What must the plaintiffs prove in order to make out their claim? Obviously the relatively straightforward elements of a conventional monopolization claim do not speak to the situation where a firm is operating in two markets and is doing so without the purpose of obtaining or preserving monopoly power in either market. (Again, it must be recalled that, at least for this motion, the plaintiffs assert only that SMUD has a lawful monopoly in retail electric power which it is using to gain "an unwarranted competitive advantage" in other markets). *Berkey Photo* seems to interpose "use of monopoly power to gain competitive advantage" as a new element, in the place of "willful acquisition or maintenance of monopoly power." The slipperiness of the distinction between "use of monopoly power", however, and lawful use of the advantages brought by size and integration has led to criticism of that decision.[16] Moreover, it is not entirely clear from the *Berkey Photo* opinion whether it condemns the use of monopoly power *per se*, or whether that power may legitimately be used in some contexts—although it appears that the latter answer is the one intended. Finally, the opinion is silent as to the extent to which the second (or "leveraged") market must be defined, if at all.[17]

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[16] Indeed, one commentator has suggested that, at least on this score the *Berkey Photo* opinion is susceptible to the same criticisms that Judge Kaufman levels against Learned Hand's decision in *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (2d Cir. 1945). *Antitrust Advisor* 80-81 (1982 Cumulative Supplement). In Judge Kaufman's pretty formulation, the *Alcoa* opinion is "a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes." *Berkey Photo*, 603 F.2d at 273.

[17] The sketchy quality of the *Berkey Photo* opinion seems to have encouraged the plaintiffs in the case at bar to argue initially that their cause of action was actually very simple. In fact, the plaintiffs asserted that little more need be established than that SMUD had monopoly power, that the plaintiffs sought to do some work that SMUD was doing, and that SMUD prevented them from doing that work. Such a theory proves too much; it is consistent neither with *Berkey Photo* nor with the body of antitrust law as a whole to say that a holder of lawful monopoly power must passively concede everytime someone else demands the

In this last regard, fortunately, recent Ninth Circuit authority is of some help. First, it appears relatively clear that the activity complained of must entail an abuse of the monopoly power itself, as opposed to the mere use of competitive advantages which the defendant enjoys for some reason distinct from its power to set prices or exclude competition from the first market. *See Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545-46 (9th Cir. 1983). (It of course remains this court's task to give life to that distinction).

Second, the challenged use of monopoly power must involve something more than the seeking of competitive advantage in another market; the advantage sought must be "unwarranted." *M.A.P. Oil*, 691 F.2d at 1305-06. While it is unclear as to whether the Ninth Circuit meant the word "unwarranted" to be a new term of art in antitrust law, its significance in this context is not particularly obscure. It should be remembered that the Ninth Circuit was discussing what it viewed as a Section 2 "monopolization" claim, and thus was specifically addressing the element of "willful acquisition or maintenance." *Id.* The Ninth Circuit has repeatedly held that "in determining whether a defendant's conduct constitutes the willful acquisition or maintenance of monopoly power required for the offense of monopolization, 'the test is whether the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition.' " *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 n. 2 (9th Cir.1983), *quoting California Computer Products, Inc. v. IBM*, 613 F.2d 727, 735-36 (9th Cir.1979). The "reasonableness" standard, in turn, has taken on meaning through its constant use as a tool of antitrust jurisprudence, particularly in the context of litigation under Section 1 of the Sherman Act. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* 171-182 (1977). In this circuit the "reasonableness" test in cases under Section 2 is the same standard as that traditionally invoked in Section 1 litigation.

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right to do some portion of what that firm does, regardless of whether the services at issue are performed within the scope of the lawfully acquired monopoly and regardless of whether the "monopolist" is merely conducting itself in the way that any other (non-monopolist) firm would under the circumstances.

Transamerica Computer Co., 698 F.2d at 1382-83 n. 2. The application of this standard to the facts of the instant case will be discussed, *infra*, in relation to the specific claims of the plaintiffs.

Finally, the *M.A.P. Oil* case makes it abundantly clear that in order to prevail the plaintiffs must define both the market in which monopoly power is allegedly held, and the separate markets in which the leveraging of that power has allegedly taken place. 691 F.2d at 1305-08. This requirement serves at least two purposes in the context of a monopoly leveraging claim. Initially, there can be no unlawful leveraging unless the defendant is seeking a competitive advantage in the provision of goods or services that is analytically distinct from the supply of those goods and services over which the defendant has a lawful monopoly. *Id.*[18] Furthermore, the requisite showing of "unreasonableness" necessarily imports an understanding of the perimeters of the leveraged markets, for the fundamental inquiry in that regard is whether the defendant's practices have a *significant* effect on competition in each of those markets. This inquiry is perforce directed to the effect on competition in each market as a whole; "[t]o amount to an unreasonable restraint of trade the anticompetitive conduct must have an effect greater than its effect upon the plaintiff[s'] business." *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir.1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979); *see also Aydin Corp. v. Loral Corp.*, 718 F.2d 897 at 902 (9th Cir. July 12, 1983). All of this follows from the axiom that the "antitrust laws . . . were enacted for the protection of competition, not competitors. . . . " *Gough*, 585 F.2d at 386, *citing Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

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[18] *Cf. Berkey Photo*, 603 F.2d at 275-76 (noting that the "monopoly leveraging" theory is "linked to the prohibition against tying arrangements in the sale of goods and services," and citing to, inter alia, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). In the *Times-Picayune* case, the Court held that there can be no unlawful leveraging via "tying" where the tied and tying products are part of the same market and are thus indistinct. *Id.* at 613-14, 73 S.Ct. at 882-83).

In summary, the courts of appeal have not precisely defined the elements of a "monopoly leveraging" claim, and the apparent doctrinal inconsistencies in the various opinions, regarding the nature of that claim, have made it difficult for this court to spell out those elements with any great confidence. Nonetheless, through cross-reference and interpolation, it is possible to set forth the following as the structure of what the plaintiffs must prove: First, that SMUD possesses monopoly power in a "relevant market"; second, that the activities of which the plaintiffs complain occurred in a defined market (or markets), distinct from the first (or monopoly) market; third, that those activities involved a use of SMUD's monopoly power, rather than mere employment of other advantages that SMUD enjoys by virtue of size, integration, etc.; fourth, that SMUD sought or gained an "unwarranted competitive advantage" in the "leveraged" market or markets (*i.e.* that SMUD's conduct amounted to an "unreasonable restraint of competition"); lastly, that the challenged conduct caused unjury to the plaintiffs of the sort cognizable under the antitrust laws.

Having identified the essential elements, the next task is to determine whether the plaintiffs have satisfied those elements in regard to each of their pending claims. The threshold question—whether SMUD in fact possesses monopoly power—is common to all of the claims; I shall thus begin with that as a discrete inquiry.

IV

SMUD'S MONOPOLY POWER

In a brief submitted to the court, SMUD admits that it "has a legal monopoly in the sale of electricity" which includes "electrical energy generation, transmission and distribution." Supplemental Memorandum in Opposition at 1, 3 (June 15, 1982). Yet in the same brief, and throughout its moving papers, SMUD denies that it holds an "economic monopoly" of the sort regulated by the antitrust laws. *E.g., id.* at 2. There is no apparent content to this distinction except that it neatly describes SMUD's litigation

posture.[19] SMUD defines a "monopoly at law" as "rights *de jure* to perform a service." *Id.* at 2. Monopoly in any sense—legal, economic or other—imports something more, however. The term necessarily implies that the described "rights" are in some sense enjoyed free from the vicissitudes of competition.[20] Moreover, monopoly, within this ordinary understanding of the term, is precisely what Congress sought to regulate when it passed the Sherman Act. *See* III P. Areeda & D. Turner, *Antitrust Law* ¶ 617 (1978). Although more precision may be needed for determining whether a firm has violated the law in any specific manner, the *Griffith* case illustrates that a leveraging analysis may begin with the determination that the defendant "has a monopoly in the popular sense." 334 U.S. at 106, 68 S.Ct. at 945. As I shall explain, the more complicated analytical process upon which SMUD insists really does nothing to alter the unremarkable "popular" conclusion that SMUD indeed has a monopoly which is a monopoly which is a monopoly.

Once again, "[m]onopoly power is the power to control prices or exclude competition." *Betaseed, Inc. v. U. & I. Inc.*, 681 F.2d 1203, 1231 (9th Cir.1982), *citing, inter alia, United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). This of course means something more than that the defendant, like most firms, decides what price it will

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[19] SMUD's stance, in essence, is that if possession of monopoly power by dint of State law means that SMUD is exempt from federal antitrust regulation, then SMUD has a monopoly. If, on the other hand, SMUD is not immune under the "state action exemption" (*see* n. 3, *supra*), then otherwise conceded monopoly evaporates—in this lawsuit, if not in real life.

[20] Given the semantic stratagem adopted by SMUD, a standard dictionary definition of the term provides a handy point of reference: "*monopoly* . . . 1: exclusive ownership through legal privilege, command of supply, or concerted action 2: exclusive possession 3: a commodity controlled by one party 4: a person or group having a monopoly." *Webster's Seventh New Collegiate Dictionary* 548 (1967). I do not suggest that Webster's necessarily provides a viable definition of a term of art; rather, my resort to Webster's is merely an attempt to understand what is being said to the court.

charge the public; it involves the ability to set prices without fear of competition. "A firm cannot impose monopoly prices if buyers are free to purchase a competitor's goods." *General Business Systems v. No. Amer. Philips Corp.*, 699 F.2d 965, 972 (9th Cir.1983). Thus in order to determine whether a firm possesses monopoly power, courts generally begin by ascertaining the relevant market, *i.e.* "the arena within which the strength of competitive forces is measured." II Kintner, *Federal Antitrust Law* § 12.2 at 325, *quoting* P. Areeda, *Antitrust Analysis* 133 (2d ed. 1974). In ascertaining the relevant market, it is vital to bear in mind the point of the exercise: "Market definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists." L. Sullivan, *Handbook of the Law of Antitrust* 41 (1977).

"Markets are primarily defined by specification of the product(s) and geographic area(s) included within them." II Kintner, *Federal Antitrust Law* § 12.2 at 325; *see, e.g., General Business Systems*, 699 F.2d at 972.[21] Put another way, "the proponent of [the monopoly leveraging] theory must identify the relevant product and geographic markets as a threshold requirement." *M.A.P. Oil*, 691 F.2d at 1306. The first question, then, is whether the plaintiffs have identified the appropriate product market within which to measure SMUD's economic power.

"In defining the relevant product market, it must be determined which products have a sufficient competitive impact on the product of the defendant to be considered collectively in deciding whether the defendant possesses monopoly power." II Kintner, *Federal Antitrust Law* § 12.3 at 325-26. "Thus, all products that are 'reasonably interchangeable,' and so can be said to compete

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[21] In the *General Business Systems* case, the Ninth Circuit described the "dimensions" of the relevant market as including "the product involved, the geographical limits within which it functions, and the appropriate time frame." 699 F.2d at 972. The last is of no particular moment in the instant case, for there is no suggestion by either side that the relevant market (however defined) has been undergoing any significant changes during the period relevant to this litigation. *See* II Kintner, *Federal Antitrust Law* § 12.2 at 325.

for the buyers' dollars, are included in the [product] market definition." *General Business Systems,* 669 F.2d at 972, *quoting United States v. E.I. duPont & Co.,* 351 U.S. at 395, 76 S.Ct. at 1007. "In sum, defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." *Smith-Kline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056, 1063 (3rd Cir.1978), *cert. denied,* 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978), *quoted in Kaplan v. Burroughs Corp.,* 611 F.2d 286, 292 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980).

Not surprisingly, the plaintiffs seek to define the product market and narrowly as possible; in short, they would limit it to the basic "product" which SMUD sells. Thus the plaintiffs assert that the "appropriate product" for purposes of this inquiry is "electric energy," and, more specifically, that SMUD's monopoly encompasses the generation, transmission and distribution of electricity to the extent that those activities are part of the "sale of the commodity electric energy." Their basic thesis is that there is no reasonable substitute for electricity.

This is scarcely a radical notion; indeed, plaintiffs cite this court to other cases in which the same basic issue was either summarily resolved by the trial court or conceded outright by the defendant electric utility company. *See City of Mishawaka v. American Electric Power Co.,* 465 F.Supp. 1320, 1325 (N.D.Ind.1979), *aff'd in part, rev'd in part on other grounds,* 616 F.2d 976 (7th Cir.1980), *Cert. denied,* 449 U.S. 1096, 101 S.Ct. 892, 66 L.Ed.2d 824; *reh'g denied,* 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385 (1981); *United States v. Otter Tail Power Co.,* 331 F.Supp. 54, 58 (D.Minn.1971), *aff'd in part, vacated in part on other grounds,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359, *reh'g denied,* 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 201 (1973), *aff'd,* 417 U.S. 901, 94 S.Ct. 2594, 41 L.Ed.2d 207 (1974). What other courts have done in other cases gives little aid to the plaintiffs in this case, however, for market definition is a factual inquiry. *E.g., Twin City Sportservice v. Charles O. Finley & Co.,* 676 F.2d 1291, 1299 (9th Cir.1982), *cert. denied* ____ U.S. ____,

103 S.Ct. 364, 74 L.Ed.2d 400 (1982). Again, the plaintiffs bear the burden of showing that there is no genuine issue as to the material facts of this case.

The unhappy reality is that the plaintiffs have presented very little evidence to support their assertions regarding the product market. Their evidentiary showing consists in large part of passages culled from various SMUD annual reports that demonstrate the widespread and varied use of electricity in several sectors of the economy, generally in the context of discussions regarding energy saving techniques employed by SMUD's customers. Nowhere in the tendered material, however, does the defendant admit that electricity is irreplaceable. To demonstrate this essential fact, the plaintiffs rely almost entirely on their request that the court take judicial notice that "there is no substitute for electric energy." Unfortunately, despite the reams of written argument submitted to the court, the parties have given virtually no attention to the legal question of whether it is proper for the court to use the evidentiary device of judicial notice in the manner proposed by the plaintiffs.

Federal Rule of Evidence 201 provides that a trial court may take judicial notice of an "adjudicative fact," provided that the "judicially noticed fact [is] not subject to reasonable dispute in that it is ... generally known within the territortial jurisdiction of the court." *Id.* "[A]djudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case." K. Davis, 2 *Administrative Law Treatise* 353, *quoted in* Fed.R.Evid. 201, advisory committee note. There is no doubt that the disputed matter in this case—the "substitutability" of electric energy—is such "an adjudicative fact." Moreover,"[j]udicial notice may be taken at any stage of the proceedings." Fed.R.Evid. 201(f). Thus the device may appropriately be used in the context of a motion for summary judgment. 1 *Weinstein's Evidence* ¶ 200[06].

The real issue is whether the asserted fact that "there is no substitute for electric energy" is "not subject to reasonable dispute." At first glance this seems a dubious proposition. Put in somewhat more sophisticated terms, "substitutability" is an inquiry into the extent to which there are "cross-elasticities of

demand" in the consumption of various products. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 612 n. 31, 73 S.Ct. 872, 882 n. 31, 97 L.Ed. 1277 (1953); *see United States v. E.I. duPont & Co.,* 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264. As the defendant fairly observes, such a determination generally requires a detailed examination of "market data, figures or other relevant material adequately describing the nature, cost, usage or other features of competing products." *Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.,* 531 F.2d 910, 919 (8th Cir.1976).

At this juncture it is important to reiterate that the analytical tools applied by the courts in this area are not ends in themselves; thus the fact that complex economic situtations require the court to employ painstaking methods does not mean that antitrust law mandates such an elaborate factfinding procedure in every case. It appears to this court that in regard to the specific issue of the relevant market within which SMUD's power is to be measured, this is a relatively straightforward case indeed. Assuredly, the notion of "reasonable interchangeability" of products is sufficiently subtle that the court cannot merely coat that determination with judicial notice and swallow it whole. Doing so would create the substantial risk that the court was relying on suppressed, and quite possibly erroneous assumptions about how things are in the real world. *See* 1 *Weinstein's Evidence* ¶ 200[06] at 200-31. There are, however, a number of facts that the court can know to be "not subject to reasonable dispute," which, taken together, provide adequate support for the ultimate factual conclusion urged by the plaintiffs.

It is beyond reasonable dispute that everyday life here in SMUD's service area involves reliance on a host of sophisticated devices, ranging from the electronic machinery used to prepare this opinion to the ubiquitous television set. For the most part, these modern instruments obviously require some external source of energy in order to function, and the vast majority of them depend on electricity to supply that energy. The court is unaware of any electronically powered device in common usage that could, without significant alteration, be run on some other form of energy. Moreover, it is a matter of daily experience that virtually

all buildings, houses and other structures—at least within this jurisdiction—are equipped with convenient outlets for electric energy to which these devices may be connected. At present, no other form of generated energy is available for use in this casual and convenient manner.

In short, there is no alternative to which consumers could readily turn should they desire to live their lives as they presently do, but without electricity. These facts, derived from common daily life and not susceptible to genuine dispute, are together sufficient for a trier of fact to conclude, in the absence of other evidence, that there is no other product which is reasonably interchangeable with electric energy. As such they are sufficient to satisfy the initial burden placed on the plaintiffs in regard to this issue. *See SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir.1980). Accordingly, the burden shifts to SMUD to "come forward with specific facts showing that there remains a genuine factual issue for trial." *Id.*

SMUD's response, essentially, is that to confine the product definition to electric energy is to define the market too narrowly. SMUD asserts that there are other forms of energy and "energy conservation products" which could conceivably be used by consumers to substitute, in some measure, for electricity. Thus the defendant submits evidence showing that most of their customers have "actual or potential access to natural gas . . . or propane or butane." Memorandum in Opposition at 51. SMUD also has provided the court with an affidavit executed by Winston Ashiwaza, a professional conservationist in SMUD's employ. Mr. Ashiwaza lists 29 sorts of "commercial and industrial appliances and equipment" and 9 sorts of "residential appliances and equipment" "which could operate on other energy sources than electric." The lists are composed mostly, though not exclusively, of heating or refrigeration devices, and the affiant indicates which of those things are "readily available locally" in a design not dependent on electricity.

The defendant's argument misses the point. The applicable test is whether other products are "reasonably interchangeable" with electricity, not whether consumers could conceivably turn to them

as a partial substitute for that form of energy. As the Supreme Court has explained:

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, *within reasonable variations in price,* only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small.

Times-Picayune Publishing, 345 U.S. at 612, n. 31, 73 S.Ct. at 882, n. 31 (emphasis added). Or again, in a passage quoted in SMUD's opposition brief:

> In the case of a product [the relevant market] may be of such a character that substitute products must also be considered, as the customer may turn to them if there is a slight increase in the price of the main product. That is the teaching of the du Pont case [citation], viz., that commodities reasonably interchangeable make up that "part" of trade or commerce which § 2 protects against monopoly power.

United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).

SMUD has come forward with no evidence from which it could reasonably be inferred that a "reasonable variation" or a "slight increase" in the price of electricity has led or would lead consumers to resort to other forms of energy to fill the myriad needs that are presently filled by electricity. Frankly, it seems incredible to suggest that anything short of a truly drastic rise in the retail cost of electricity would cause consumers to scrap the electrically powered appliances that they currently own in favor of purchasing new ones powered by some other source, to convert existing equipment, or to forego entirely or in any large measure the use of electricity. This point is underscored by the fact that any large-scale switch to alternative forms of energy would perforce require structural changes in virtually every room of every building in daily use. In short, the only reasonable conclusion to be drawn from the evidence now before the court is that there is no other product which is "reasonably interchangeable" with electrical energy; thus that product provides the appropriate point of refer-

ence for determining the "relevant market" within which to test SMUD's economic power.

The question of which geographic area is appropriate for this purpose is even more readily resolved. Once again, it is important to focus on the purpose of the inquiry: To ascertain the area in which SMUD effectively competes. In the words of the Supreme Court:

> It is clear, of course, that the "line of commerce" affected need not be nation-wide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area.... Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition.

Standard Oil Co. v. United States, 337 U.S. 293, 299-300 n. 5, 69 S.Ct. 1051, 1055 n. 5, 93 L.Ed. 1371 (1949).[22] As Professor Sullivan points out,

> Geographic market definitions are made for the same purpose as product market definitions. If sellers of a product within a given geographic area can increase price or cut production without a prompt flow of supply into the area from outside of it, those sellers are operating in a separate market from sellers in other areas.

L. Sullivan, *Handbook of the Law of Antitrust* 67 (1977).

The undisputed evidence in the instant case is that SMUD is, for all intents and purposes, the sole seller of electricity within its service area. Should SMUD raise its prices to a level which consumers find uncomfortable, there is simply no other provider of the product that could readily come into that area and offer

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[22] The *Standard Oil* case arose under Section 3 of the Clayton Antitrust Act, 15 U.S.C. § 14. It is well established, however, that the "relevant market" inquiry under the Sherman Act is identical to that employed in cases arising under the Clayton Act. *See United States v. Grinnell Corp.*, 384 U.S. 563, 573, 86 S.Ct. 1698, 1705, 16 L.Ed.2d 778; *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1300 (9th Cir.), *cert. denied,* ____ U.S. ____, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982).

cheaper electricity to the public. Again, SMUD'S own arguments illustrate this fact. Its chief assertion in this regard is that if consumers who would otherwise be in SMUD'S service area find SMUD's prices too high, they could choose to locate elsewhere. In other words, if SMUD customers, actual or potential, don't like the way that the defendant operates its business or the prices it charges, they can move. This hardly describes a group of consumers who enjoy the benefits of effective competition in the marketplace.

The fact is that in the area in which SMUD operates, it is effectively free of competition for the sale of electricity. There is simply no more sensible geographic area to use in defining the market in which to measure SMUD's power, for there is no other market in which SMUD operates, or in which other firms can pose a realistic threat to SMUD.[23] In summary, the relevant market for determining the scope of SMUD's economic power is the one suggested by the plaintiffs: The sale of electrical energy within the SMUD service area. Given that SMUD is the sole firm of any size operating in this market, and that SMUD sets the rates that it charges consumers of its product, it follws ineluctably that SMUD possesses monopoly power as that term is used in antitrust jurisprudence. What remains is to determine whether the plaintiffs have established that SMUD used that power to gain an unwarranted competitive advantage in other markets.

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[23] As an alternative definition for the appropriate geographical area, SMUD proposes that the court draw a circle around the State Capitol, and include the area within a 25 mile radius. This may or not provide a more accurate definition of the Greater Sacramento Metropolitan Area than can be derived from simply charting the defendant's service area. It would do nothing, however, to aid the court in determining the area of effective competition, for it would contain two distinct regions: One in which SMUD does not compete because it provides no service, and another within which SMUD need not compete because it provides virtually all of the electrical energy used.

V

THE REMAINING ELEMENTS OF PLAINTIFF'S CLAIMS

1. *"Electrical Distribution Systems"*

Briefly summarized, the plaintiffs assert that SMUD has used the power it holds in the market for electrical energy to smother competition for the construction of "electrical distribution systems." It will be recalled that, according to the plaintiffs, an EDS consists of the wiring and other electrical distribution equipment connecting the consumer's home or other structure with SMUD power lines and related equipment at some point *off* of the consumer's property. *See* n. 5, *supra*. The parties agree that SMUD regularly runs distribution lines past the boundaries of its customers' property. In the most egregious case from the plaintiffs' standpoint, SMUD supplies all of the underground distribution equipment connecting private residences to SMUD power poles or similar equipment. SMUD generally does not permit its customers to employ other firms, such as the plaintiffs', to act in lieu of SMUD in contructing the portion of the EDS which SMUD constructs. This, the plaintiffs contend, is unlawful, for the construction of the entire EDS is a zone of commerce which must be left open to free competition.

As I have explained at length, the plaintiffs have satisfied the first element of their monopoly leveraging claim by showing that SMUD in fact possesses monopoly power. Moreover, the unrebutted evidence demonstrates that the plaintiffs have established the element that most concerned the court in *Berkey Photo*: There can be no doubt that SMUD's activities in this respect constituted a use of its monopoly power.

This can perhaps be most simply explained by noting that the cause of action for monopoly leveraging is "linked to the prohibition against tying arrangements in the sale of goods and services." *Berkey Photo*, 603 F.2d 263. At the core of that prohibition is the notion of "coercion," *i.e.*, the restriction of the consumer's freedom to purchase a product over which the defendant has market control by making the sale of that product conditional on the purchase of some separate product. *See Foremost Pro Color, Inc.*

v. Eastman Kodak Co., 703 F.2d 534, 540 (9th Cir.1983); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216-17. Thus in the instant case SMUD has used its control of the market for electrical energy to restrict its customers' freedom to have other firms construct "electrical distribution systems" on their property. Whatever uncertainty may exist regarding the precise meaning of the phrase "use of monopoly power," it surely was meant to embrace situations as familiar to antitrust law as the present one.

Past that, however, the plaintiffs' claim founders. Essential to either a tying claim or a monopoly leveraging claim is a showing that the product which the plaintiffs seek to supply is indeed separate from the product controlled by the defendant. *Times-Picayune Publishing*, 345 U.S. at 614, 73 S.Ct. at 883 (tying claim); *M.A.P. Oil*, 691 F.2d at 1306. In this case, the plaintiffs have failed to demonstrate (at least for summary judgment purposes) that what they refer to as the "electrical distribution system" comprises a product that is in any real sense separate from electrical energy.

The plaintiffs initially attempt to address this issue by invoking the traditional means of determining product market scope that are used in order to ascertain whether a firm possesses monopoly power. They point out, for instance, that there is no "cross-elasticity of demand" between the sale of electrical energy and the construction of EDS; nor are the two "products" "reasonably interchangeable."[24] While obviously it is true that consumers will

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[24] The plaintiffs also tender certain deposition testimony elicited from SMUD employees as evidence of the existence of "electrical distribution systems" as a separate economic entity. In the cited excerpts, the deponents do indeed refer to "distribution systems." They generally do so, however, only after plaintiffs' counsel has introduced the term and repeatedly used it in the questions propounded. (It will be noted that the court has also adopted the term, not because it is convinced that the term has actual significance, but merely in order to respond to the allegations. *See* n. 5, *supra*). Moreover, in context it is unclear whether the deponents are referring to the things defined by the plaintiffs as "electrical distribution systems"; the witnesses could well be using the term to describe some larger or smaller portion of what they clearly think of as "SMUD's plant." The inquiry into the separability of energy

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not respond to price fluctuations in electrical energy by buying electrical distribution systems, that fact is not particularly helpful in the present context. It could as readily be argued that milk is a separate product from the container in which it is packaged, for if the price of milk rises, thirsty consumers will not attempt to drink the carton instead. Now milk and milk cartons may well constitute separate products in a given economic context; the point, however, is that the tools tendered by the plaintiffs are just not the right ones for the job of making that determination. In short, the devices usually employed by courts to define relevant markets or submarkets in order to test a purported monopolist's strength will not serve here, for they simply ask a different set of questions than those posed by the issue of separability of different things that function together.

This point is illustrated by the Ninth Circuit's decision in the *M.A.P. Oil* case. That was a lawsuit brought against a major petroleum corporation (Texaco, Inc.) by, *inter alios,* a number of independent wholesale distributors of Texaco gasoline. The plaintiffs alleged, among other things, that Texaco had used its "monopoly power" in the "market" for Texaco brand gasoline as a lever to gain unwarranted advantage in a separate market for "distribution services." These services allegedly included such things as "marketing advice, credit services, equipment loans, real estate improvements, and brand identification and pricing signs. . . ." 691 F.2d at 1307. The Ninth Circuit agreed that, "viewed in the abstract," under the criteria used to measure relevant submarkets, those services are "distinct from the simple delivery of gasoline." *Id.* The court decided, however, that a different inquiry was needed in order to ascertain "the 'economic significance' of those services under the facts of [that] case." The Ninth Circuit noted that consumers did not purchase these services separately, and that, while some customers received fewer of the services than others, all nonetheless paid the same price. The court concluded:

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from EDS is simply not susceptible to resolution through this sort of wordplay; nor can such a complex factual issue be resolved by putting buzz words in the mouths of witnesses. In short, the court finds this "evidence"wholly unpersuasive.

> In short, economic reality suggests that none of plaintiffs' customers *purchased* "distribution services"; instead, those services were essentially marketing techniques designed to either initially obtain or subsequently retain a customer. [ ] Customers can choose between direct delivery of gasoline and delivery through distributors or commission agents, but in the final analysis they purchase a single product—gasoline.

Id. at 1307-08.

In a brief filed with the court after the publication of *M.A.P. Oil,* the plaintiffs argue that the Ninth Circuit's decision in that case supports their position. The plaintiffs point to the fact that SMUD charges consumers a "separate price" for some fraction of the distribution construction that it does. Specifically, as of 1978 SMUD charged $250.00 for installing an underground "service run" from a SMUD pedestal to a single family residence. The plaintiffs contend that, under *M.A.P. Oil,* this fact establishes that the "electrical distribution system" is a product distinct from retail electrical energy.

The plaintiffs read both their own complaint and the *M.A.P. Oil* opinion too narrowly. In the first place, SMUD's underground "service run" to residential dwellings encompasses only a small portion of what the plaintiffs define as the market for "electrical distribution systems." There is no claim that SMUD makes a separate charge for the bulk of the work that it does installing distribution networks on the premises of industrial, commercial, or multi-family residential customers. For that matter, there is no charge for most of the installation work done on "electrical distribution systems" serving single family homes, given that plaintiffs define those systems as commencing at the outer property line of each residential subdivision in which such homes are located. If their interpretation of *M.A.P. Oil* is correct, the plaintiffs have provided the court with an entirely inaccurate definition of the leveraged market.

More importantly, the plaintiffs have misapprehended the significance of the Ninth Circuit's opinion. In focusing on the fact that only one price was paid by customers, the court was not setting that as the test for whether the alleged "products" were

separate or unitary. If that were the test, a monopolist could sell two distinct products, and simply by absorbing the cost of the "leveraged" product into a single, inflated price for the "monopolized" product it could defeat any claim that it had leveraged its monopoly power. Moreover, the plaintiffs' interpretation would compel the conclusion that the Ninth circuit has implicitly repudiated the "tying" cases in which, facing the same analytical problem of separability, that court determined that a single price had been set for what were indeed two distinct products. *See, e.g., Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 47-49 (9th Cir.1971), *cert. denied*, 405 U.S. 955, 92 S.Ct. 1173, 31 L.Ed.2d 232 (1972).

The important teaching of *M.A.P. Oil* is that the question of whether two things are one product or two for purposes of monopoly leveraging analysis is determined, finally, by examining the "economic significance" of those things from the point of view of the consumer. Whether customers pay one price or two is significant (if at all) only to the extent that it provides an indication of what it is that those consumers are in fact purchasing in a specific context, This proper focus on the consumer's viewpoint is only another recognition of the fundamental principle that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitor* . . . .'" *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). Whether real or potential competition exists for the provision of a given good or service depends on the existence of consumer demand, not on a firm's decision regarding the sort of work that it would like to do.

Understood in this way, the *M.A.P. Oil* decision is entirely consonant with the manner in which the Ninth Circuit has approached the separate product problem in tying cases. "In this circuit, [the court of appeals has] looked carefully at the 'function of the aggregation' in order to determine whether only a single product is sold." *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1215 (9th Cir.1977), *Citing Siegel*, 448 F.2d at 48; *accord, Klamath-Lake Pharmaceutical Ass'n. v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1289 (9th Cir.1983), *petition*

for cert. denied, 51 U.S.L.W. 3884 (U.S. June 2, 1983) (No. 82-1969). As Kintner points out, this "functional approach focuses on what the purchaser desires to acquire." II Kintner, *Federal Antitrust Law* § 10.54 at 229. Thus, under the Ninth Circuit's analysis,

> [t]he critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand. Products that function together and are sold in combination may still be "separate" if consumers would prefer to buy them individually at the price necessary to market them separately. [. . .] Whether a producer's combined products should be considered as separate can be decided only by looking at consumer behavior. It is the relationship of the producer's selling decision to market demand, not the physical characteristics of the products alone, that determines the existence of legally separable products.

Klamath-Lake Pharmaceutical, 701 F.2d at 1289 (footnote omitted).

The evidence tendered by SMUD on this point speaks directly to the approach taken by the Ninth Circuit. That evidence demonstrates, for purposes of this motion, that SMUD has successfully attempted to define the boundaries of its distribution network by the demands of the specific classes of customers it serves. According to the affidavits submitted by the defendant, SMUD carries electricity in the voltage needed by the customer up to the point where it can be conveniently connected to the customer's electrical wiring system.

Examined in the light most favorable to SMUD, and resolving all factual disputes in the defendant's favor, one can elicit the following concrete examples: In bringing power to private residences SMUD transports electricity in low voltage right up to the house, and leaves it to the homeowner (or developer) to arrange for the installation of wiring and equipment to the specific sorts of outlets desired at the locations within the house where the property owner wishes them placed. Similarly, when serving large industrial customers, SMUD will carry power in a higher voltage

to a point on or near the premises, and lets the customer "step down" the electricity to the levels it needs and transmit that power—perhaps in varying voltages—to the structures in which it will be used. Finally, when conveying electricity to multi-use structures such as apartment buildings and shopping centers, SMUD stops at a point where the property owner can install a system that serves the uses to which the owner wishes to commit the property, and permits the owner flexibility in changing those uses in the future.

Thus, viewed in the manner prescribed by Rule 56, the evidence shows that SMUD's network stops in any given instance right at the point that the consumer's specific needs dictate the construction of an individualized distribution system. Put in other terms, SMUD constructs distribution facilities to the extent, and only to the extent, that the consumer has no interest in those facilities independent of the desire to obtain raw electric power—or so a jury could reasonably conclude based on the evidence now before the court. Under the appropriate functional analysis it appears, therefore, that the plaintiffs have not met their burden of showing that "electrical energy systems" are a product distinct from retail electrical energy.[25] Rather, for purposes of

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[25] It should be noted that if the court adopted the recognized alternative method of analyzing this issue, SMUD's position would be stronger still. According to Kintner, the "second approach that has been utilized to establish a product's 'separateness' is to focus on each product's market." II Kintner, *Federal Antitrust Law* § 10.54 at 230. The leading case putting forth this second analysis is *Washington Gas Light Co. v. Virginia Electric & Power Co. (VEPCO)*, 438 F.2d 248, 253 (4th Cir.1971). The facts of that case are remarkably similar to those of the case at bar. The defendant, an integrated electric utility company, began installing " 'underground residential distribution' (URD) lines instead of the common overhead variety if the builder agreed to pay the additional expenses involved, usually amounting to a sum of around $280." *Id.* at 250. VEPCO subsequently decided to offer URD installation free to builders who "went 'all electric.' " *Id.* The local gas company sued, claiming, inter alia, that VEPCO's practices constituted an illegal tying arrangement under § 1. The trial court held in favor of the plaintiff, but the Fourth Circuit reversed, ruling that the plaintiff had failed to show two separate products. The court of appeals took the view that

parsing this claim in the instant motion, the court concludes that SMUD is correct in asserting that it sells only one product—electricity. Accordingly, the plaintiff's motion for summary judgment must be denied insofar as it relates to their claim that SMUD used its monopoly power as a lever in a separate market for "electrical distribution systems".[26]

2. *"Street and Outdoor Lighting Systems"*

As I have explained, the plaintiffs cannot succeed in their motion for summary judgment on their claim regarding "electrical distribution systems" because they have failed to satisfy an essential element of the monopoly leveraging claim as articulated in *M.A.P. Oil, i.e.*, the distinction between the "leveraging" product and the "leveraged." Their claim regarding "street and outdoor lighting systems" fails on the even more fundamental ground which formed the basis for the *Berkey Photo* decision

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URD " 'is merely a method by which a product—electricity—is delivered to the consumer. [. . .] Underground Residential Distribution is ancillary to both the seller and the buyer in much the same way as a free meal given to an airline passenger is ancillary to the sale of an airline ticket. Therefore, it is difficult to see how there could be a separate tying product in the commercial sense.' " *Id.* at 254, *quoting Gas Light Co. of Columbus v. Georgia Power Co.*, 313 F.Supp. 860, 869 (M.D.Ga.1970).

[26] Given that the plaintiffs have failed to satisfy this basic element of their EDS claim, it is not necessary for the court to reach the remaining elements. It is by no means clear, however, that SMUD's activities could in any event be considered so "unreasonable" as to constitute the taking of "an unwarranted competitive advantage." *See* the discussion in Part III of this opinion, *Supra*. In this regard, I note the evidence tendered to the court showing that the cost to consumers would necessarily rise if someone other than SMUD did the disputed installation work. Moreover, this fact raises the question of whether the plaintiffs can show "causal antitrust injury." *See Forro Precision*, 673 F.2d at 1058. The question of SMUD's alleged leveraging in the "market" for "electrical distribution systems" may well be moot if it turns out that SMUD would have captured that market in any event, by underpricing the plaintiffs through use of competitive advantages apart from use of monopoly power. *See Berkey Photo*, 603 F.2d at 288; *see generally* the discussion of plaintiffs' "street and outdoor lighting systems" claim, *infra*.

itself. Simply put, the plaintiffs have not established that any of SMUD's alleged activities in this area constitute a use of monopoly power as such. Without meeting this quintessential element, the plaintiffs cannot prevail.

Street lighting systems and outdoor lighting systems are each described in Part II of this opinion. As I noted there, these terms seem, at least at first blush, to describe two different things. Nonetheless, the plaintiffs assert that together they describe a single product, which they define as follows: "A street and outdoor lighting system is the entire street or outdoor lighting equipment from the source of energy feed for the lighting equipment to and including the lighting fixtures on public and private property." Plaintiff's Memorandum filed September 14, 1981, at 26.[27]

The plaintiffs point to four specific ways in which SMUD has allegedly used its power in the market for electrical energy to "smother competition" in the purported market for street and outdoor lighting systems. First, they assert that SMUD unfairly promotes its Rate 53 by informing potential customers who inquire about street lighting that SMUD will construct and maintain such a system at no initial cost to the customer. Second, the plaintiffs contend that SMUD abuses its power by offering "package rates" (like Rate 53) at an "anticompetitive price." What plaintiffs are apparently referring to is, once again, the fact that SMUD builds and maintains both street lighting systems and outdoor lighting systems without requiring the customer to pay immediately for the capital costs; rather, it absorbs those costs into its rate structure and recoups them by charging a higher monthly rate to customers who avail themselves of that service.

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[27] I observe in passing that the plaintiffs have made no attempt to detail the limits of this purported market, either in terms of what should properly be included in the product definition, or in terms of the geographic area in which competition actually exists. Thus, as noted in Part III of this opinion, it is virtually impossible for the court to gauge the economic significance of the conduct which the plaintiffs assert is unlawful. Given the even more basic flaw in the plaintiffs' claim, however, it is unnecessary to plunge back into the thicket of market definition in order properly to dispose of the instant motion.

Third, the plaintiffs complain specifically about this amortization process. Lastly, the plaintiffs charge that SMUD takes advantage of its monopoly position by using its own utility poles as places to mount security lights without letting the plaintiffs climb or mount anything on these poles.

The issue is whether any of these practices constitutes a use of SMUD's power *as a monopolist*. In *Berkey Photo*, Judge Kaufman repeatedly distinguishes between the (unlawful) use of monopoly power and the legitimate use of advantages which the monopolist enjoys by virtue of other reasons, such as size, integration, foresight, business acumen and the like. 603 F.2d at 274-76, 281, 283, 291 & n. 50. Thus

> [t]he key to analysis, it must be stressed, is the concept of market power. Although power may be derived from size, . . . the two are not identical. A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an excercise of power over the market.

Id. at 274 (citations and footnote omitted). In other words, a firm is merely using legitimate competitive advantages if the advantages used are those that would accrue to any firm of similar size and sophistication, regardless of its share of market power. In contrast, "a use of monopoly power is an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control." *Id.* at 291.[28]

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[28] Certain examples help illuminate this distinction. "A classic illustration [of the use of monopoly power] is an insistence that those who wish to secure a firm's services cease dealing with its competitors." *Berkey Photo*, 603 F.2d at 275. Yet another "classic example of such a use is a refusal to deal in goods or services needed by a competitor in a second market. But, a firm without control of the market that attempts this will simply drive the purchaser to take its patronage elsewhere." *Id.* at 291 (citation omitted). Finally, in this opinion I have discussed the use of monopoly power to force a consumer to purchase a second product in combination with the product over which the seller exerts market control. *See* Part V, *supra*. In each of these instances it is *solely*

Whether a given course of conduct constitutes a use of monopoly power is again a question of fact. *See Berkey Photo*, 603 F.2d at 292. Based on the evidence before the court, the jury could reasonably find that none of the activities of which the plaintiffs complain in this claim constitute a use of SMUD's monopoly power as defined in *Berkey Photo*. Only a monopolist can force its customers to accept a product that they would not otherwise purchase at the price tendered, but any firm can use the regular contact it has with its customers to promote a new product. The fact that the firm which promotes a product in that fashion is a monopolist does not necessarily render the promotion a use of monopoly power.

Similarly, any firm of sufficient size and organization can offer goods or services without immediately receiving payment in full, even if great capital expenditures are involved. Clearly the jury could conclude that the fact that SMUD can afford to offer "package deals" (*e.g.*, its Rate 53 arrangement) can be ascribed to its size and integration, rather than to its control of the electric energy market. Indeed, there does not appear to be any reason why SMUD could not offer similar arrangements if it only controlled, say, one-half or one-quarter of the market in which it now functions.

Finally, the fact that SMUD uses its own utility poles to mount security lights does not in itself demonstrate a use of monopoly power. As the court emphasized in *Berkey Photo*,

> [A] large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division

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the monopolist's control of the primary market that permits it to act as it does, and to do so effectively. This same factor is present in each of the cases cited by the plaintiffs in support of their contention that SMUD has used its monopoly power to gain advantage in the "market" for "street and outdoor lighting systems." *See Griffith*, 344 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236; *Six Twenty-Nine Productions v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966); *Packaged Programs v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958); *City of Mishawaka, Ind.*, 465 F.Supp. 1320 (N.D.Ind. 1979).

> possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.

603 F.2d at 276. Nor is the character of SMUD's conduct necessarily changed by its refusal to allow the plaintiffs to climb its utility poles or mount devices on them. Although the plaintiffs have demonstrated that SMUD has monopoly power, there is no evidence that SMUD controls all or most of the poles in its service area; nor is there any evidence of a lack of other alternative sites upon which security lights could be mounted. Thus, contrary to what the plaintiffs suggest, SMUD's conduct is not the equivalent of a refusal by a monopolist to sell its product to another firm with which it is competing in a separate market. *See, e.g., Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir.1966); *Packaged Programs v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir.1958).[29]

In short, the evidence now before the court suggests that a reasonable jury could find that SMUD has not used its monopoly power to gain an advantage—warranted or unwarranted—in any market for "street and outdoor lighting systems." The plaintiffs motion for summary judgment on the elements of this claim must also be denied.

Conclusion

The monopoly leveraging theory announced in *Berkey Photo* appears to describe an analytically new antitrust offense; we are

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[29] I note SMUD's assertion that its action is based upon safety considerations and the need to maintain the integrity of its poles. By reason of the foregoing analysis, it is unnecessary to determine whether these tendered justifications would be sufficient to justify its rule and thus not make its action "unreasonable" in any event.

taught, however, that it is merely a variant of the offense of monopolization. In either case, it requires a substantially different mode of analysis than that generally applied under § 2. Having ascertained the elements of the plaintiffs' claim, the court concludes that the plaintiffs failed to meet their burden of showing the absence of a genuine issue of material fact in regard to those elements. Accordingly, this portion of the plaintiffs' motion for summary judgment is hereby denied.

IT IS SO ORDERED.

Appendix F

United States Court of Appeals
For The Ninth Circuit

No. 84-2395
DC CV 79-0861 LKK

Grason Electric Company, a California corporation, Luppen and Hawley, Inc., a California corporation, M and W Electric Company, a California corporation, et, al.,
Plaintiffs-Appellees,

vs.

Sacramento Municipal Utility District,
Defendant-Appellant.

JUDGMENT

Appeal from the United States District Court for the Eastern District of California (Sacramento).

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded with instructions.

Filed and Entered September 4, 1985

Appendix G

Judgment in a Civil Case

United States District Court

FILED
October 4, 1985
Clerk U.S. District Court
Eastern District of California

Eastern District of California
Lawrence K. Karlton, Judge

Civ S-79-861-LKK

Grason Electric Company

v.

Sacramento Municipal Utility
District

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the above-named case is hereby dismissed.

Judgment is entered accordingly.

Appendix H

Statutes

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.)

Cal. Pub. Util. Code § 12721. Contracting powers.

A district may make contracts and enter into stipulations of any nature whatsoever, either in connection with eminent domain proceedings or otherwise, including, without limiting the generality of the foregoing, contracts and stipulations to indemnify and save harmless, to employ labor, and to do all acts necessary and convenient for the full exercise of the powers granted in this division. (Stats.1951, c. 764, p. 2229, § 12721.)

Cal. Pub. Util. Code § 12801. Powers of acquisition, construction, and operation of works; purchase of commodities and services from other utilities.

A district may acquire, construct, own, operate, control, or use, within or without, or partly within or partly without, the district, works or parts of works for supplying the inhabitants of the district and public agencies therein, or some of them, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the collection, treatment, or disposition of garbage, sewage, or refuse matter, and may do all things necessary or convenient to the full exercise of the powers herein granted. The district may also purchase any of such commodities or services from any other utility district, public agency, person, or private company, and distribute them. (Stats.1951, c. 764, p. 2231, § 12801.)

Cal. Pub. Util. Code § 12809. Rates and charges for commodities and service.

The rates and charges for commodities or service furnished by a district shall be fixed by the board. As far as possible utilities shall be self-supporting but the board is not required to fix a rate which in its opinion is unreasonablly high, nor to cover by rates large expenditures and the interest thereon required for future needs and developments. (Stats.1951, c. 764, p. 2232, § 12809.)

Cal. Pub. Util. Code § 12892. Insufficient revenue; tax levy.

If, in the opinion of the board, the revenues will not be sufficient for any and all lawful purposes the board shall levy a tax for such purpose or purposes and fix the amount of money necessary to be raised therefor by taxation. (Stats.1951, c. 764, p. 2235, § 12892.)

Cal. Pub. Util. Code § 13091. Acquisition of money; purpose; issuance of bonds; term; restrictions on use of money.

A district may borrow money from time to time for the purpose of constructing, reconstructing, replacing, extending or improving its system for supplying the district and its inhabitants with electric energy, and may issue and sell bonds to evidence the indebtedness created by such borrowing. No such money may be used:

(1) For constructing or improving works located outside the district boundaries which exist on the date this Chapter 6.5 is enacted.

(2) For acquiring any property owned by a public utility.

(3) For constructing or improving works for generating electricity.

(4) For constructing or improving works used, or to be used, in whole or in part either for the receipt, transmission and delivery of electric energy for any supplier of electric power or for the exchange of electric power with any person or entity. This provision shall not prevent the district from using such money for the purposes set forth in the initial sentence of this section.

Such bonds shall not be issued for a term in excess of 20 years after the date of such bonds; provided, that this sentence shall not limit the power of a district to refund such bonds. (Added Stats.1957, c. 2237, P. 3874, § 1, as amended Stats.1962, 1st Ex.Sess., c. 6, p. 154, § 1, effective April 6, 1962.)

Cal. Pub. Util. Code § 13651. Annexable territory.

Any public agency or portion thereof or unincorporated territory within the boundaries of a district (hereinafter referred to collectively as "territory") not included within the boundaries of a special district may be annexed thereto in the manner provided in this article. (Stats.1951, c. 764, p. 2247, § 13651.)

Cal. Pub. Util. Code § 12703. Eminent domain

A district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this division.

(Amended by Stats.1975, c. 582, p. 1173, § 13.)

Cal. Pub. Util. Code § 12819. Advertising; prohibited if for increased consumption; authorized for efficient operation or use.

(a) Every district furnishing light, heat, or power shall expend no funds for advertising when such advertising encourages increased consumption of such services or commodities.

(b) Nothing in this section shall prohibit a district furnishing light, hear, or power from expending funds for advertising which encourages the more efficient operation of the facilities, works, or utilities of the district, or for advertising which encourages the more efficient use of light, heat, or power, the conservation of energy or natural resources, or presents accurate information on the economical purchase, maintenance, or use of any appliance or device using light, heat, or power.

(Added by Stats. 1974, c. 194, p. 387, § 4, urgency, eff. April 30, 1974.)